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Military Rule of Evidence (MRE) 513: A Shield to Protect Communications of Victims and Witnesses to Psychotherapists

Major Stacy E. Flippin

“Although MRE 513 provides little protection to statements made by the accused, it can provide substantial protections to statements made by victims and witnesses.”¹

Introduction

You are the chief of military justice at a large TRADOC installation. One of the trial counsel in your shop, who has only been in the position two months, comes into your office with a concerned look on his face. He has received a discovery request in his first rape case, a high-profile case involving allegations that a drill sergeant raped a trainee. The trial defense counsel learned that the trainee received counseling at the installation community health center after the rape, and now she is claiming that there may potentially be exculpatory evidence in the trainee’s mental health records. The defense counsel is requesting that the government produce those records. After receiving the discovery request, the trial counsel spoke with the trainee. The trainee is extremely uncomfortable with anyone having access to her mental health records and will not give her consent to release the records. The trial counsel wants to know whether he has to produce the records in response to the defense discovery request. You know there is a psychotherapist-patient privilege, but you are not sure what the scope of the privilege is or to what extent it will protect the trainee’s records. How should you advise the trial counsel?

President Clinton’s issuance of Executive Order 13,140 in October 1999 established a military rule of privilege for communications between psychotherapists and patients.² As the newest rule of privilege, the contours of Military Rule of Evidence (MRE) 513 have yet to fully take shape.³ The result is that military justice practitioners may not completely understand its implications. When dealing with MRE 513 and the psychotherapist-patient privilege, military justice practitioners may be inclined to focus on its applicability to statements of the accused. Trial counsel are often concerned with how they may

effectively get around any claim of psychotherapist-patient privilege to admit statements of an accused into evidence. Defense counsel frequently focus on how they can use the privilege to protect statements of their clients. Practitioners may give little thought or emphasis to the other—and possibly more powerful—aspect of MRE 513, the protection it affords to confidential communications of victims and witnesses to psychotherapists.

This article examines the development of the psychotherapist-patient privilege in military law, focusing on MRE 513 from the perspective of how its provisions can be used by a trial counsel to protect statements made by victims and witnesses. The objective of this article is to ensure that trial counsel, chiefs of military justice, and victim-witness liaisons understand how MRE 513 shields victims and witnesses. This article examines the following areas: (1) the development of psychotherapist-patient privilege in federal law and the Supreme Court’s decision in *Jaffee v. Redmond*;⁴ (2) the development of psychotherapist-patient privilege in military law before and after *Jaffee*; (3) the adoption of MRE 513 and its provisions; (4) the obligations that the victim-witness program provisions of *Army Regulation (AR) 27-10*⁵ impose on trial counsel and victim-witness liaisons regarding the psychotherapist-patient privilege; and (5) the interplay between MRE 513 and service regulations regarding access to medical and mental health records.

The Development of Psychotherapist-Patient Privilege in Federal Law

The Supreme Court’s recognition of a psychotherapist-patient privilege in *Jaffee* marked a major turning point in the development of a psychotherapist-patient privilege in federal law.⁶ In order to understand the Court’s decision in *Jaffee*, it is necessary to know some of the background regarding the development of federal privilege law.

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1. Lieutenant Colonel R. Peter Masterton, *The Military’s Psychotherapist-Patient Privilege: Benefit or Bane for Military Accused?*, ARMY LAW., Nov. 2001, at 22.
 2. See Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999).
 3. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 513 (2002) [hereinafter MCM].
 4. 518 U.S. 1 (1996).
 5. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 18 (6 Sept. 2002) [hereinafter AR 27-10].
 6. See *Jaffee*, 518 U.S. at 15.

*Federal Privilege Law and Psychotherapist-Patient Privilege
Before Jaffee*

For many years, Congress has authorized the Supreme Court to promulgate rules of court for civil actions, criminal cases, bankruptcy proceedings, and admiralty and maritime cases.⁷ Based on this authority, in 1965, the Chief Justice of the Supreme Court, in his capacity as Chairman of the Judicial Conference of the United States, appointed the Judicial Conference Advisory Committee on Rules of Evidence (Advisory Committee) to draft federal rules of evidence.⁸ The Supreme Court approved the Advisory Committee's proposed Federal Rules of Evidence (FRE) and transmitted them to Congress in November 1972.⁹

Article V of the proposed FRE governed the rules of privilege. More specifically, Article V contained nine specific privilege rules, including a psychotherapist-patient privilege in proposed FRE 504.¹⁰ Military justice practitioners should be familiar with proposed FRE 504 because MRE 513 is based in part on this proposed rule.¹¹ This section examines characteristics of the proposed FRE 504, to include the nature of the privilege, who holds the privilege, and the scope of the privilege.

The rule of privilege contained in the proposed FRE 504 provided as follows:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.¹²

Under the proposed rule, the patient possessed the privilege. Besides the patient, a number of different parties could claim the privilege; they included the psychotherapist on the patient's behalf, the patient's guardian or conservator, or the personal representative of a deceased patient.¹³

The proposed rule was narrow in scope. It defined a "psychotherapist" as "a person authorized to practice medicine in any state or nation . . . while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction or . . . a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged."¹⁴ On its face, the proposed rule applied only to physicians performing psychotherapy-type treatment and licensed or certified psychologists.¹⁵

7. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS 29 (1962) [hereinafter RULE COMM. REPORT]; see also Act of June 29, 1940, Pub. L. No. 76-675, 54 Stat. 688 (discussing criminal rules); Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (governing civil rules); Bankruptcy Act of 1898, 55 Cong. Ch. 541, 30 Stat. 544.

8. RULE COMMITTEE REPORT, *supra* note 7, at v-vi. A preliminary draft of the proposed rules was circulated "to the bench, the bar, and the teaching profession" in March 1969. *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong. 41 (1974) (testimony of Judge Albert B. Maris, Chairman, Standing Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States); see also Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969). There was no significant change in the psychotherapist-patient privilege provisions between the preliminary draft and the final draft subsequently submitted to Congress. Compare Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. at 257-59 (containing preliminary draft of proposed psychotherapist-patient privilege), with Proposed Rules of Evidence for United States District Courts and Magistrates, 56 F.R.D. 183, 240-41 (1972) (containing final draft of proposed psychotherapist-patient privilege).

9. See 56 F.R.D. at 183 (containing transmittal memorandum and the full text of all the proposed rules). After receiving the proposed rules, Congress passed a statute which provided that Congress must expressly approve the Federal Rules of Evidence for them to become effective. Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9; see also *Hearings on H.R. 5463, supra* note 8 (providing testimony of Judge Albert B. Maris, Chairman, Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States).

10. 56 F.R.D. at 230-58. The specific privileges included a lawyer-client privilege, a psychotherapist-patient privilege, a husband-wife privilege, a communication to clergyman privilege, a political vote privilege, a trade secrets privilege, a state secrets and other information privilege, and an identity of informer privilege. *Id.*

11. MCM, *supra* note 3, MIL. R. EVID. 513 analysis, at A22-45.

12. 56 F.R.D. at 241. While the proposed FRE 504 created a psychotherapist-patient privilege, it contained "no provision for a general physician-patient privilege." *Id.*

13. *Id.* (Proposed FED. R. EVID. 504(c) 1972).

14. *Id.* at 240 (Proposed FED. R. EVID. 504(a)(2) 1972).

15. Major David L. Hayden, *Should There Be a Psychotherapist Privilege in Military Courts-Martial?*, 123 MIL. L. REV. 31, 46-47 (1987).

The psychotherapist-patient privilege of the proposed rule was not absolute. It contained three exceptions.¹⁶ The first exception concerned proceedings to hospitalize a patient for mental illness.¹⁷ A second exception concerned examinations ordered by a judge.¹⁸ The third exception dealt with situations when a mental or emotional condition was an element of a claim or a defense.¹⁹

The proposed privilege rules were particularly controversial. In congressional hearings, the privilege provisions in Article V of the proposed rules received substantial criticism.²⁰ In fact, “[d]isagreement over the privilege rules threatened to prevent passage of the remaining sections. Ultimately, the privilege section was eliminated and a single rule was substituted in its place.”²¹ Congress finally approved FRE 501, a general rule of privilege. Federal Rule of Evidence 501 provided that privilege rules “shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience.”²² Thus, Congress essentially deferred to the federal courts to determine which privileges exist under federal law.

Because FRE 501 left it to the federal courts to determine what privileges existed, the courts sometimes differed regard-

ing whether federal law recognized a privilege. With respect to the psychotherapist-patient privilege, the different circuits of the U.S. Court of Appeals split concerning whether federal law recognized this privilege and the extent and scope of the privilege.²³ The Court granted certiorari in *Jaffee v. Redmond*²⁴ to resolve this split.

The Jaffee Decision

In *Jaffee*, the Supreme Court recognized a psychotherapist-patient privilege under FRE 501.²⁵ Starting with the proposition that testimonial privileges are disfavored because the public should have access to all possible evidence, the Supreme Court noted that exceptions to the general rule disfavoring testimonial privileges could be justified by a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.”²⁶ The Supreme Court found that a psychotherapist-patient privilege would serve significant private and public interests.²⁷ Specifically, the Court reasoned that the psychotherapist-patient privilege would promote private interests because confidentiality was instrumental to an individual’s successful treatment.²⁸ It also found that the psychotherapist-patient privilege would promote “the public

16. 56 F.R.D. at 241 (Proposed FED. R. EVID. 504(d) 1972).

17. *Id.* (Proposed FED. R. EVID. 504(d)(1) 1972).

18. *Id.* (Proposed FED. R. EVID. 504(d)(2) 1972).

19. *Id.* (Proposed FED. R. EVID. 504(d)(3) 1972).

20. See S. REP. NO. 93-1277, at 6 (1974). According to Rep. William Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, a House subcommittee that worked on the proposed rules, “[Fifty] percent of the complaints in our committee related to the section on privileges.” *Federal Rules of Evidence: Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong. 6 (1974).

21. Hayden, *supra* note 15, at 44.

22. FED. R. EVID. 501. The full text of FRE 501 currently reads as follows:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Id.

23. Compare *In re Doe*, 964 F.2d 1325 (2d Cir. 1992) (recognizing a psychotherapist-patient privilege under Rule 501), and *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983) (recognizing a psychotherapist-patient privilege), with *United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994) (declining to recognize a psychotherapist-patient privilege in a criminal child sexual abuse case), *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir. 1989) (declining to recognize a psychotherapist-patient privilege), and *United States v. Meagher*, 531 F.2d 752 (5th Cir. 1976) (holding that no psychotherapist-patient privilege exists in federal criminal trials).

24. 518 U.S. 1, 7-8 (1996) (“Because of the conflict among the courts of appeals and the importance of the question, we granted certiorari.”).

25. *Id.* at 15. One factor that the Supreme Court relied on in recognizing the privilege was that all fifty states and the District of Columbia had adopted some form of a psychotherapist-patient privilege. *Id.* at 12.

26. *Id.* at 9 (quoting *United States v. Trammel*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206 (1960) (Frankfurter, J., dissenting)).

27. *Id.* at 10-12.

28. *Id.* at 10-11.

interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.”²⁹ The Supreme Court held that these public and private interests outweighed the modest evidentiary benefit that would result from denial of the privilege.³⁰ Because of the great societal benefits the Court believed would result from the privilege, it not only recognized the privilege, but also broadened its scope to cover communications to licensed social workers as well as licensed psychiatrists and psychotherapists.³¹

Although the Supreme Court recognized the psychotherapist-patient privilege, it did little to outline its bounds. The Court reasoned that “[b]ecause this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours.”³² Thus, the Supreme Court provided little guidance for lower courts to use in applying the privilege.³³ That left federal courts largely on their own to develop the contours of the federal psychotherapist-patient privilege.³⁴

Psychotherapist-Patient Privilege in Military Law Before and After *Jaffee*

The development of the psychotherapist-patient privilege in military law has differed from that of federal law both before and after the *Jaffee* decision. Part of that difference may be attributed to the source of military law. Under Article 36 of the Uniform Code of Justice (UCMJ), the President may prescribe rules of evidence “which shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States dis-

trict courts.”³⁵ Under Article 36, “[a] majority of the Military Rules of Evidence were . . . subsequently adopted with minor modifications from the Federal Rules of Evidence.”³⁶

One major difference between the FRE and the MRE, *however*, concerns the rules of privilege. Unlike FRE 501, which is a general rule of privilege, the MRE contain specific privileges.³⁷ The analysis to MRE 501 explains that a general rule of privilege is not practical in a military setting:

Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the worldwide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyer investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.³⁸

Consequently, the MRE delineated very specific privileges.³⁹ Another difference is at the time of their implementation, the MRE did not recognize a psychotherapist-patient privilege.⁴⁰ In fact, the MRE not only failed to recognize a psy-

29. *Id.* at 11.

30. *Id.* at 11-12.

31. *Id.* at 15.

32. *Id.* at 18.

33. See Stacy Arnowitz, *Following the Psychotherapist-Patient Privilege Down the Bumpy Road Paved by Jaffee v. Redmond*, 1998 ANN. SURV. AM. L. 307, 319-20 (1998).

34. Two recent law review articles track the development of the federal psychotherapist-patient privilege since *Jaffee*. Melissa Nelken, *The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law*, 20 REV. LITIG. 1 (2000) (examining the major developments in the federal law of psychotherapist-patient privilege since *Jaffee*); Robert Aronson, *The Mental Health Provider Privilege in the Wake of Jaffee v. Redmond*, 54 OKLA. L. REV. 591 (2001) (discussing federal decisions after *Jaffee*).

35. UCMJ art. 36 (2002).

36. Hayden, *supra* note 15, at 70.

37. MCM, *supra* note 3, MIL. R. EVID. 502-509, 513.

38. *Id.* MIL. R. EVID. 501 analysis, at A22-38 (“The Committee deemed the approach taken by Congress in the Federal Rules impracticable within the armed forces.”).

39. The specifically listed privileges are: lawyer-client; communications to clergy; husband-wife; classified information; government information other than classified information; identity of informant; political vote; and deliberations of courts and juries. See *id.* MIL. R. EVID. 501 analysis, at A22-38; MIL. R. EVID. 502-509.

chotherapist-patient privilege, but also explicitly rejected a physician-patient privilege. Military Rule of Evidence 501(d) provided that “[n]otwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.”⁴¹

Before *Jaffee*, military courts uniformly rejected any claim of a psychotherapist-patient privilege because the rules did not recognize this privilege and explicitly rejected a doctor-patient privilege.⁴² In *United States v. Mansfield*, the Court of Military Appeals (CMA) stated, “[T]here is no physician-patient or psychotherapist-patient privilege in federal law, including military law.”⁴³ After the Supreme Court recognized a psychotherapist-patient privilege in *Jaffee*, the issue of whether *Jaffee* applied to the military remained.

Service Court Rulings

The service courts uniformly held that the application of a psychotherapist-patient privilege was inconsistent with and contrary to MRE 501(a) and 510(d).⁴⁴ Under MRE 501, military courts may adopt a new rule of privilege “recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence,” provided the rule meets the requirements of MRE 501(a) and MRE 501(d).⁴⁵ Pursuant to MRE 501(a), the application of such a federally recognized privilege in military courts must be “practicable and not contrary to or inconsistent with the code, these rules, or this Manual.”⁴⁶ Military Rule of Evidence 501(d) provides that

“information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.”⁴⁷ Thus, the question for military courts was whether MRE 501(a)(4) and MRE 501(d) precluded application of a psychotherapist-patient privilege in the military.

The Navy-Marine Court of Criminal Appeals (NMCCA) addressed whether the *Jaffee* privilege applied to the military in *United States v. Paaluhi*.⁴⁸ In *Paaluhi*, the NMCCA flatly rejected the argument that *Jaffee* created a psychotherapist-patient privilege in the military, stating that “the application of a psychotherapist-patient privilege to courts-martial would be ‘contrary to’ and ‘inconsistent with’ the language of [MRE] 501(d), 101(b), and 501(a)(4).”⁴⁹ Consequently, the NMCCA held that “until the President expressly exercises his authority under Article 36(a), UCMJ, there is no general psychotherapist-patient privilege applicable to courts-martial.”⁵⁰ The NMCCA held that the military judge had properly admitted statements of the accused made during a psychological evaluation conducted by a Navy clinical psychologist.⁵¹

Similarly, the Air Force Court of Criminal Appeals (AFCCA) rejected the application of *Jaffee* to the military in *United States v. Stevens*.⁵² Using a rationale comparable to that of the NMCCA, the AFCCA “interpret[ed] [MRE] 501(a)(4) and 501(d) to preclude application of the privilege recognized in *Jaffee*.”⁵³ The court held that a psychotherapist-patient privilege did not protect the accused’s statements to a clinical psychologist and a psychiatrist.⁵⁴

40. Hayden, *supra* note 15, at 66. The specifically listed privileges are: lawyer-client; communications to clergy; husband-wife; classified information; government information other than classified information; identity of informant; political vote; and deliberations of courts and juries. See MCM, *supra* note 3, MIL. R. EVID. 501 analysis, at A22-38; MIL. R. EVID. 502-509.

41. MCM, *supra* note 3, MIL. R. EVID. 501(d). “The military has always been explicit and intransigent in its non-recognition of any physician-patient privilege.” Hayden, *supra* note 15, at 66.

42. See *United States v. English*, 47 M.J. 215 (1997); *United States v. Mansfield*, 38 M.J. 415 (C.M.A. 1993); *United States v. Toledo*, 25 M.J. 270 (C.M.A. 1987); *United States v. Brown*, 38 M.J. 696 (A.F.C.M.R. 1993).

43. 38 M.J. 415, 418 (C.M.A. 1993).

44. See, e.g., *United States v. Rodriguez*, 54 M.J. 156, 160 (2000), *cert. denied*, 531 U.S. 1151 (2001).

45. MCM, *supra* note 3, MIL. R. EVID. 501(a)(4).

46. *Id.*

47. *Id.* MIL. R. EVID. 501(d).

48. 50 M.J. 782 (N-M. Ct. Crim. App. 1999), *rev’d on other grounds*, 54 M.J. 181 (2000).

49. *Id.* at 786.

50. *Id.* The NMCCA recently reaffirmed its position regarding the inapplicability of the *Jaffee* privilege to the military in *United States v. McDonald*, 57 M.J. 747 (N-M. Ct. Crim. App. 2002).

51. *Paaluhi*, 50 M.J. at 786.

52. No. 32733, 1999 CCA LEXIS 198 (A.F. Ct. Crim. App. June 4, 1999) (unpublished), *aff’d*, 54 M.J. 377 (2000).

The Army Court of Criminal Appeals (ACCA) also rejected the application of *Jaffee* to the military in *United States v. Rodriguez*.⁵⁵ The ACCA held that “a federal common law psychotherapist-patient privilege, without specifically tailored parameters and exceptions necessary in a military environment, is not ‘practicable’ in trials by court-martial.”⁵⁶ Noting that “[u]nlike the general privilege in the Federal Rules of Evidence, the privileges created by the Military Rules of Evidence have to be understood, interpreted, and applied . . . by non-lawyers,”⁵⁷ the ACCA found that it was not practicable “to expect non-attorneys to uniformly and accurately apply a general, undefined *Jaffee* privilege in a military environment.”⁵⁸ Holding that the psychotherapist-patient privilege “is a narrower version of a broader doctor-patient privilege,” the ACCA held that MRE 501(d) barred the *Jaffee* psychotherapist-patient privilege in courts-martial.⁵⁹ The ACCA concluded that a psychotherapist-patient privilege did not protect statements made by the accused to an Army psychiatrist.⁶⁰

The Court of Appeals for the Armed Forces (CAAF) settled this issue on appeal in *United States v. Rodriguez*.⁶¹ Affirming the ACCA’s decision, the CAAF held that MRE 501(d) “precludes application of doctor-patient or psychotherapist-patient privilege to the military.”⁶² The CAAF concluded that a privilege did not apply to the accused’s statements to an Army psychiatrist and held that:

[P]rior to *Jaffee* there was no privilege. Post-*Jaffee* and prior to adoption of Mil.R.Evid. 513, there was still no psychotherapist-patient in the military because it was contrary to Mil.R.Evid. 501(d). When the President promulgated Mil.R.Evid. 513, he did not simply adopt *Jaffee*; rather, he created a limited psychotherapist privilege for the military. In the absence of a constitutional or statutory requirement to the contrary, the decision as to whether, when, and to what degree *Jaffee* should apply in the military rests with the President, not this Court.⁶³

Military Rule of Evidence 513

In 1999, President Clinton exercised his authority under Article 36(a) and established a psychotherapist-patient privilege for the military. Executive Order 13,140 implemented MRE 513, which protected confidential communications between a patient and psychotherapist.⁶⁴ This rule covers any communication made after 1 November 1999.⁶⁵ The following sections highlight those provisions of MRE 513 that are relevant to trial counsel in protecting statements made by victims or witnesses.

53. *Id.*

54. *Id.*

55. 49 M.J. 528 (Army Ct. Crim. App. 1998), *aff’d*, 54 M.J. 156 (2000), *cert. denied*, 531 U.S. 1151 (2001). In *United States v. Demmings*, the ACCA had suggested that *Jaffee* might apply to the military, but did not decide the issue because it held that the defense’s failure to assert a privilege waived that issue at the court-martial. 46 M.J. 877, 883 (Army Ct. Crim. App. 1997). In *Rodriguez*, the ACCA treated the privilege issue as a matter of first impression. *Rodriguez*, 49 M.J. at 530.

56. *Id.* at 528.

57. *Id.* at 531-32.

58. *Id.* at 532.

59. *Id.* at 533.

60. *Id.* at 528.

61. 54 M.J. 156 (2000), *cert. denied*, 531 U.S. 1151 (2001).

62. *Id.* at 160.

63. *Id.* at 161.

64. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 12, 1999).

65. *Id.* at 55,120. One author opined that the development of MRE 513 by the Joint Service Committee on Military Justice was “an attempt to head off Congressional action.” Major Dru Brenner-Beck, “*Shrinking the Right to Everyman’s Evidence: Jaffee in the Military*,” 45 A.F. L. REV. 201, 239 (1998). Before the promulgation of MRE 513, the Senate Armed Services Committee proposed a provision to the National Defense Authorization Act of 1998 that would have required the Secretary of Defense to submit an amendment to the MRE to the President that would recognize a psychotherapist-patient privilege. See S. REP. NO. 105-29, at 319 (1997). The Conference Committee decided not to adopt that provision because the Department of Defense had “already made significant progress toward drafting a recommended amendment.” H.R. CONF. REP. NO. 105-340, at 812 (1997).

Military Rule of Evidence 513 is not a physician-patient privilege, but “a separate rule based on the social benefit of confidential counseling recognized by Jaffee, and similar to the clergy-penitent privilege.”⁶⁶ It applies only to UCMJ proceedings and does “not limit the availability of such information internally to the services, for appropriate purposes.”⁶⁷

The rule of privilege in MRE 513(a) protects “a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient’s mental or emotional condition.”⁶⁸ The rule defines a “patient” as “a person who consults with or is examined or interviewed by a psychotherapist for the purposes of advice, diagnosis, or treatment of a mental or emotional condition.”⁶⁹ Under this definition, a patient includes not only an accused, but also any victim or witness involved in the court-martial proceeding. “Psychotherapist” includes “a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility”⁷⁰

Under MRE 513, the privilege belongs to the patient. Military Rule of Evidence 513(a) provides that the patient has “a privilege to refuse to disclose and to prevent another person from disclosing a confidential communication.”⁷¹ In addition to the patient, other specified persons may claim the privilege.⁷² These specified persons include guardians, conservators and, psychotherapists or assistants to a psychotherapist acting on behalf of the patient.⁷³ As a result, the patient, or the guardian or conservator of the patient may authorize the trial or defense counsel to claim the privilege on the patient’s behalf.⁷⁴

Exceptions to the Privilege

The psychotherapist-patient privilege established in MRE 513 is not an absolute privilege. There are eight exceptions where the privilege is inapplicable: (1) the patient is deceased;⁷⁵ (2) the communication evidences spouse abuse, child abuse, or neglect, or “in a proceeding where one spouse is charged with a crime against the person of the other spouse or a child of either spouse;”⁷⁶ (3) federal law, state law or service regulation imposes a duty to report the communication;⁷⁷ (4) the patient’s mental or emotional condition makes the patient a danger to himself or others;⁷⁸ (5) the communication “clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought . . . to enable . . . anyone to commit or plan to commit what the patient knew or reason-

66. See MCM, *supra* note 3, MIL. R. EVID. 513 analysis, at A22-45.

1999 Amendment: Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. Rule 513 clarifies military law in light of the Supreme Court decision *Jaffee* . . . In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. See the analyses for Rule 302 and Rule 501.

Id.

67. *Id.*

68. *Id.* MIL. R. EVID. 513(a).

69. *Id.* MIL. R. EVID. 513(b)(1).

70. *Id.* MIL. R. EVID. 513(b)(2).

71. *Id.* MIL. R. EVID. 513(a).

72. *Id.* MIL. R. EVID. 513(c).

73. *Id.*

74. *Id.*

75. *Id.* MIL. R. EVID. 513(d)(1).

76. *Id.* MIL. R. EVID. 513(d)(2).

77. *Id.* MIL. R. EVID. 513(d)(3).

78. *Id.* MIL. R. EVID. 513(d)(4).

ably should have known to be a crime or fraud;”⁷⁹ (6) if necessary to “ensure the safety and security” of military personnel or property, military dependents, mission accomplishment, or classified information;⁸⁰ (7) when an accused offers statements or other evidence “concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or [MRE] 302;”⁸¹ and (8) when the communication’s disclosure is constitutionally required.⁸²

From an accused’s perspective, these exceptions may appear to swallow the rule.⁸³ In many circumstances, the privilege will not protect an accused’s statements to mental health professionals.⁸⁴ Conversely, exceptions that apply to the accused may not apply to statements victims or witnesses make to psychotherapists.⁸⁵ For instance, the exception in MRE 513(d)(7) concerning evidence the accused offers in defense, extenuation, or mitigation regarding a mental or emotional condition will not apply to statements of a victim or witness.⁸⁶ Overall, MRE 513 affords more protection to statements of victims and witnesses than it does to statements of an accused.

Procedures to Resolve Disputes

If the parties dispute the production or admissibility of records or communications of a patient, MRE 513 allows a party to seek an interlocutory ruling by the military judge.⁸⁷ To obtain a ruling, a party shall file a written motion at least five days before the entry of pleas, serve the motion on the opposing

party and the military judge, and, whenever practical, notify the patient or the patient’s guardian, conservator, or representative that the motion has been filed and the patient has an opportunity to present matters.⁸⁸ Military Rule of Evidence 513(e)(2) requires the military judge to hold a hearing before ordering the production or admission of a patient’s records or communications.⁸⁹ If either party shows “good cause,” the military judge may close the hearing.⁹⁰ At the hearing, either party may call witnesses, including the patient, and present other evidence.⁹¹ The patient has the opportunity to attend the hearing and be heard at his own expense, even if the parties do not call the patient as a witness.⁹² A military judge may conduct an in camera inspection of the evidence in question “if necessary to rule on the motion”⁹³ and may admit none, part, or all of the evidence in question. Thus, a military judge may issue protective orders to prevent unnecessary disclosure of the patient’s records or communications.⁹⁴ “The motion, related papers, and record of the hearing are to be sealed and remain under seal unless the military judge or an appellate court or appellate court orders otherwise.”⁹⁵

Role of the Trial Counsel

A victim or witness may authorize the trial counsel to claim the privilege.⁹⁶ When there is a dispute over the production or admissibility of records or communications of a victim or witness, the trial counsel may seek a ruling from the military judge.⁹⁷ A trial counsel can help protect a victim’s or witness’s

79. *Id.* MIL. R. EVID. 513(d)(5).

80. *Id.* MIL. R. EVID. 513(d)(6). This is the broadest exception to the privilege. The privilege does not exist “if anyone believes that disclosure is necessary to protect military personnel, readiness, or the mission.” STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 128 (Cum. Supp. 2001).

81. MCM, *supra* note 3, MIL. R. EVID. 513(d)(7).

82. *Id.* MIL. R. EVID. 513(d)(8).

83. SALTZBURG, *supra* note 80, at 128.

84. See Masterton, *supra* note 1, at 21-22 (“[B]ecause of the many exceptions to MRE 513, defense counsel should not rely on the rule to protect statements made by a client to mental health professionals”).

85. See, e.g., MCM, *supra* note 3, MIL. R. EVID. 513(d)(7).

86. *Id.*

87. *Id.* MIL. R. EVID. 513(e)(1).

88. *Id.* MIL. R. EVID. 513(e)(1)(A)-(B).

89. *Id.* MIL. R. EVID. 513(e)(2).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* MIL. R. EVID. 513(e)(3).

94. *Id.* MIL. R. EVID. 513(e)(4).

privacy by invoking the protective procedures outlined in MRE 513, such as requesting a closed hearing or seeking protective orders, when appropriate. If a defense counsel seeks an interlocutory ruling from the military judge, the trial counsel should examine whether the defense has complied with the timeliness and notice requirements of MRE 513.⁹⁸

Military Case Law Regarding MRE 513

Military case law does not provide any guidance regarding MRE 513, which is perhaps not surprising given its relatively recent implementation.⁹⁹ The trial counsel, therefore, may have to rely on other areas or sources for guidance on MRE 513 issues, such as when the exceptions to MRE 513 apply.¹⁰⁰ Military Rule of Evidence 513(d)(8) is the most likely exception to apply to statements a victim or witness makes to a psychotherapist. This exception provides that no privilege exists when disclosure is constitutionally required.¹⁰¹ Defense counsel may attempt to use this exception as a catchall argument to overcome the privilege. While neither MRE 513 nor its analysis provides any substantive guidance on when disclosure is constitutionally required, “the exception probably envisions those situations where an accused’s right to confrontation would be limited by a witness invoking the privilege under this Rule.”¹⁰²

Federal and military case law provides scant authority regarding the right to confrontation in connection to MRE 513. While there is no military case directly on point, federal cases addressing the confrontation right in the context of the privilege may have persuasive value. This section examines federal cases dealing with the Sixth Amendment right to confrontation overcoming the *Jaffee* privilege, and with the Sixth Amendment overcoming statutory privileges generally.

Given the differences between the general *Jaffee* privilege and the specific privilege in MRE 513, the relevance of federal case law to the military is questionable. Very little federal case law addresses when the Constitution requires an exception to the *Jaffee* privilege. No circuit court of appeals has considered this issue since *Jaffee*,¹⁰³ but one circuit addressed the issue prior to *Jaffee*.¹⁰⁴ Only four federal district courts have addressed the issue since *Jaffee*.¹⁰⁵

The U.S. Court of Appeals for the Second Circuit’s (Second Circuit) pre- *Jaffee* decision in *In re John Doe*¹⁰⁶ examined whether a court could review the psychiatric history of a crucial government witness in camera and subject to a protective order. Concerned “that a preclusion of any inquiry into appellant’s psychiatric history would violate the Confrontation Clause,” the Second Circuit held that “discovery concerning appellant’s history of mental illness and treatment may go on *in camera*

95. *Id.* MIL. R. EVID. 513(e)(5). *See also* United States v. Briggs, 48 M.J. 143 (1998). In *Briggs*, the CAAF considered whether a military judge had properly denied the accused access to a rape victim’s medical records. *Id.* at 144. The court stated that the preferred method for resolving discovery disputes concerning production of medical records “is for the military judge to inspect the medical records in camera to determine whether any exculpatory evidence was contained in the file prior to any government or defense access.” *Id.* at 145. Although *Briggs* pre-dates the implementation of MRE 513, its preference for an in camera review to resolve discovery disputes regarding medical records would logically seem to apply to discovery disputes under MRE 513 as well.

96. *See* MCM, *supra* note 3, MIL. R. EVID. 513(c).

97. *See id.* MIL. R. EVID. 513(e)(1).

98. *See id.* MIL. R. EVID. 513.

99. Appellate court decisions regarding psychotherapist-patient privilege are still dealing with communications occurring before 1 November 1999, the effective date of MRE 513. *See, e.g.*, United States v. McDonald, 57 M.J. 747, 757 (N-M. Ct. Crim. App. 2002). Statements at issue were made prior to 1 November 1999 and are not protected by MRE 513. *Id.*

100. Possible sources of guidance include federal case law and military cases applying MRE 412, the rape shield law. *See* MCM, *supra* note 3, MIL. R. EVID. 412(b)(1)(c). The commentary to the *Military Rules of Evidence Manual* indicates that it might be helpful to examine MRE 412(b)(1)(C) in connection with MRE 513(d)(8). SALTZBURG, *supra* note 80, at 129.

101. *See id.* MIL. R. EVID. 513(d)(8). Defense counsel are already being urged to use MRE 513(d)(8) to overcome the privilege. *See* Masterson, *supra* note 1, at 22-23.

102. SALTZBURG, *supra* note 80, at 129.

103. *See* United States v. Alperin, 128 F. Supp. 2d 1251, 1253 (N.D. Cal. 2001).

104. *In re John Doe*, 964 F.2d 1325, 1329 (2d Cir. 1992).

105. *See* United States v. Alperin, 128 F. Supp. 2d 1251, 1253 (N.D. Cal. 2001); United States v. Doyle, 1 F. Supp. 2d 1187, 1189-90 (D. Or. 1998); United States v. Hansen, 955 F. Supp. 1225, 1226 (D. Mont. 1997); United States v. Haworth, 168 F.R.D. 660 (D. N.M. 1996).

106. *John Doe*, 964 F.2d at 1329.

subject to the protective order.”¹⁰⁷ The Second Circuit did not reach the issue of the admissibility of such evidence at trial.¹⁰⁸

In *United States v. Alperin*,¹⁰⁹ the defense sought access to a victim’s psychiatric records on the grounds that they might support the defendant’s claim of self-defense. Noting that *Jaffee* did not address how to apply the psychotherapist-patient privilege when a defendant’s constitutional rights were implicated, the district court applied a balancing test.¹¹⁰ The district court ordered the production of the psychiatric records for an in-camera review to examine the potential relevance and materiality of the records. The court weighed the relevance and materiality of the records against the victim’s privacy interest to determine whether disclosure was constitutionally required.¹¹¹

In *United States v. Doyle*,¹¹² the defense sought access to the victim’s psychiatric records. The defense argued that the government’s calling the victim in support of an upward departure from the sentencing guideline waived any psychotherapist-patient privilege, and that the defendant’s Sixth Amendment right to compulsory process trumped the psychotherapist-patient privilege. In quashing the defense subpoena request, the district court found that the victim had not waived the privilege and rejected the defense waiver argument.¹¹³ The district court judge explicitly refused to use a balancing test when analyzing the Sixth Amendment issue because he believed that *Jaffee* had rejected such an approach.¹¹⁴ He also refused to conduct an in camera hearing, holding that a review of the records would be a breach of the privilege.¹¹⁵

In *United States v. Hansen*,¹¹⁶ the defense sought access to a deceased victim’s psychiatric records to support a claim of self-

defense. Finding that the deceased victim had little privacy interest and that “the likely evidentiary benefit is great,” the court granted the defense request for a subpoena.¹¹⁷ This case has little relevance for the military, however, because MRE 513(d)(1) allows for the disclosure of confidential communications when the patient is deceased.¹¹⁸

In *United States v. Haworth*,¹¹⁹ the defense sought access to the psychiatric records of a government witness, contending that the defendant’s Sixth Amendment right to confrontation required an exception to the *Jaffee* privilege. The district court, however, distinguished between the right to confrontation and a right to discover privileged information. After conducting an in-camera review, the court ruled that the records were privileged and were not subject to discovery.¹²⁰ Overall, these cases do not present a unified approach to resolving this issue. None have set forth any particular criteria or test that other courts could use.

Federal Cases Regarding Statutory Privileges and the Sixth Amendment Generally

The Supreme Court has not completely resolved the issues of when a defendant’s Sixth Amendment rights to confrontation, cross-examination, and compulsory process overcome a statutory privilege. Nonetheless, trial counsel can still find some guidance in the Court’s cases.

In *Davis v. Alaska*,¹²¹ the Court examined whether the defendant was denied his right of cross-examination when the defense counsel was prohibited from questioning a witness

107. *Id.*

108. *Id.*

109. *Alperin*, 128 F. Supp. 2d at 1252.

110. *Id.* at 1253-54.

111. *Id.* at 1255.

112. 1 F. Supp. 2d 1187, 1189-90 (D. Or. 1998).

113. *Id.* at 1189.

114. *Id.* at 1190.

115. *Id.* at 1191.

116. 955 F. Supp. 1225, 1226 (D. Mont. 1997).

117. *Id.*

118. See MCM, *supra* note 3, MIL. R. EVID. 513(d)(1).

119. 168 F.R.D. 660 (D. N.M. 1996).

120. *Id.*

121. 415 U.S. 308 (1974).

regarding his juvenile record because the record was confidential under state statute.¹²² The defense sought to question the witness about his juvenile probationary status resulting from his conviction for burglarizing two cabins.¹²³ The defense wanted to show that the witness could have made a faulty identification of the defendant because the witness feared the revocation of his probation or because he wished to shift suspicion away from himself to the defendant.¹²⁴ Relying on a state statute that made juvenile adjudications confidential, the trial judge granted the prosecution's motion for a protective order and prohibited the defense from inquiring about the juvenile adjudication of the witness.¹²⁵ The Court reversed, finding that the lower court denied the defendant his right to confrontation. The Court held that "[t]he State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding so vital a constitutional right as the effective cross-examination for bias of an adverse witness."¹²⁶

In *Pennsylvania v. Ritchie*,¹²⁷ the Supreme Court addressed the issue of whether the defendant's Sixth Amendment right to confrontation was violated when he was denied access to the confidential files of child protective services. The defense sought access to the files, arguing that "the file might contain the names of favorable witnesses, as well as other unspecified exculpatory evidence."¹²⁸ A plurality of the Court rejected the broad interpretation of *Davis* for which the defendant argued. The Court reasoned that if it interpreted *Davis* to mean that any possible evidence of impeachment material trumps a statutory privilege, "the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery."¹²⁹ The Court concluded that "the failure to disclose the CYS [Children and Youth Services] file [did not violate] the Confrontation Clause."¹³⁰ Since the state statute in question did

not grant CYS files absolute immunity, however, the Supreme Court affirmed that portion of the state supreme court's decision that remanded the case to the trial court for the trial judge to determine whether the file contained exculpatory information within the meaning of *Brady v. Maryland*.¹³¹

Thus, the Supreme Court has not yet fully resolved when a statutory privilege must yield to a defendant's constitutional rights. *Davis* implies that when the defense is already aware of the privileged information and can articulate a specific theory of relevance, the court must allow the defense to use that information at trial. *Ritchie* suggests that courts should not allow defendants access to privileged files merely because they offer vague theories that the records might contain potentially useful or relevant information. The area between these two opposite ends of the spectrum remains uncharted by the Supreme Court.

Military Case Law Regarding MRE 412

Because federal case law provides military attorneys with little assistance on when disclosure of confidential communications to a psychotherapist may be constitutionally required, it may be helpful to look to other areas of military law. For instance, both MRE 513 and MRE 412 have exceptions which dictate that courts must admit constitutionally required evidence.¹³² An examination of MRE 412(b)(1)(C) may help a trial counsel to understand the contours of MRE 513(d)(8).¹³³

Courts decide on a case-by-case basis whether evidence is constitutionally required under MRE 412(b)(1)(C).¹³⁴ To be required, the evidence must be relevant, material, and favorable to the defense, and its probative value must outweigh any unfair

122. *Id.* at 309.

123. *Id.* at 310-11.

124. *Id.* at 311.

125. *Id.*

126. *Id.* at 320.

127. 480 U.S. 39, 42-43 (1987). A state statute required the files in question to remain confidential. *Id.* at 43.

128. *Id.* at 44. The prosecutor had also been denied access to the files. *Id.* at 44 n.4.

129. *Id.* at 52.

130. *Id.* at 54.

131. *Id.* at 57-58. Notably, the Supreme Court "express[ed] no opinion on whether the result in this case would have been different if the statute had protected the [Child and Youth Services] files from disclosure to *anyone*, including law enforcement and judicial personnel." *Id.* at 58. See *Brady v. Maryland*, 373 U.S. 83 (1963) (examining when exculpatory evidence must be turned over to the defense).

132. Compare MCM, *supra* note 3, MIL. R. EVID. 513(d)(8), with MCM, *supra* note 3, MIL. R. EVID. 412(b)(1)(C).

133. See Major Kevin D. Smith, *Navigating the Rape Shield Maze: An Advocate's Guide to MRE 412*, ARMY LAW., Oct./Nov. 2002, at 1 (providing general MRE 412 information).

134. *United States v. Carter*, 47 M.J. 395, 396 (1998).

prejudice.¹³⁵ The key to admissibility under MRE 412(b)(1)(C) is relevance.¹³⁶ The defense must show that the evidence in question “is relevant to an important fact asserted or challenged by the defense. Relevance increases as defense counsel is able to link specific evidence to an articulated defense theory.”¹³⁷ The defense “has the burden of demonstrating why the general prohibition in Mil.R.Evid. [MRE] 412 should be lifted to admit evidence of the sexual behavior of the victim.”¹³⁸

A trial counsel may argue that the rules regarding MRE 412(b)(1)(C) should apply by analogy to MRE 513(d)(8), given that they both address when evidence is constitutionally required to be admitted. The trial counsel may assert that the defense bears the burden to demonstrate why the psychotherapist-patient privilege does not apply in a particular case. Also, the trial counsel may argue that the defense must show that the confidential communication is relevant to an issue of importance asserted or challenged by the defense. Requiring the defense to articulate a specific theory regarding the relevancy of the evidence sought appears to be consistent with the Supreme Court’s decision in *Ritchie*. At a minimum, *Ritchie* seems to caution that a judge should carefully examine any records for exculpatory evidence and should grant the defense access only to information for which *Brady* requires disclosure.

Defense counsel, however, may have difficulty articulating a specific theory of relevance because they often will not know the contents of the communications to which they seek access. Thus, defense counsel may have difficulty demonstrating that production of the communications is constitutionally required, particularly if they have the burden of proof.¹³⁹

The Interplay of the Victim/Witness Program with MRE 513

Army regulations impose additional obligations on trial counsel in connection with the psychotherapist-patient privilege that are distinct from those imposed by MRE 513. *Army Regulation (AR) 27-10* requires trial counsel and victim-witness liaisons to inform victims and witnesses about their rights, including their right to have their privacy respected.¹⁴⁰ This section will explain how informing victims or witnesses about their rights includes advising them about their right to claim the psychotherapist-patient privilege.

Chapter 18 of *AR 27-10* outlines the Army’s victim-witness program.¹⁴¹ Under this program, all personnel within the military justice system, including commanders, judge advocates, and law enforcement officials, must ensure “that victims and witnesses of crime are treated courteously and with respect for their privacy. Interference with personal privacy and property rights will be kept to an absolute minimum.”¹⁴² Thus, a crime victim has “[t]he right to be treated with fairness, dignity, and a respect for privacy.”¹⁴³ Additionally, when a victim “has been subjected to attempted or actual violence, every reasonable effort will be made to minimize further traumatization.”¹⁴⁴

The provisions of the Victim-Witness Program in *AR 27-10* impose an obligation on the trial counsel, the chief of military justice, and the victim-witness liaison to protect the privacy of victims and witnesses to the maximum extent possible.¹⁴⁵ Part of ensuring the privacy of victims and witnesses is ensuring that victims and witnesses know they can claim the psychotherapist-patient privilege. This includes informing victims and witnesses of their right to refuse to answer questions from either side regarding conversations with their psychotherapists and to claim the privilege during interviews with defense counsel.¹⁴⁶

135. See Smith, *supra* note 133, at 6; United States v. Greaves, 40 M.J. 432, 438 (C.M.A. 1994).

136. See Smith, *supra* note 133, at 6; Carter, 47 M.J. at 396.

137. SALTZBURG, *supra* note 80, at 601.

138. Carter, 47 M.J. at 396 (quoting United States v. Moulton, 47 M.J. 227, 228 (1998)).

139. Masterton, *supra* note 1, at 23.

140. See AR 27-10, *supra* note 5, para. 18-4(c), 18-10(a).

141. *Id.* ch. 18.

142. *Id.* para. 18-2(a).

143. *Id.* para. 18-10(a)(1).

144. *Id.* para. 18-2(b).

145. *Id.* paras. 18-2(a), 18-10(a)(1).

146. See *id.*

Staff judge advocates (SJA) also have a responsibility to provide for annual victim-witness training to agencies involved with the victim-witness program.¹⁴⁷ As a practical matter, the military justice section often assumes this responsibility. The chief of military justice should ensure that trial counsel are trained regarding their responsibilities to inform victims and witnesses about their rights under the psychotherapist-patient privilege. The chief of military justice should also ensure that the appropriate medical and mental health personnel, law enforcement personnel, chaplains, and family advocacy personnel are trained regarding this privilege.

The Interplay of Service Regulations Regarding Access to Medical Records with MRE 513

The Army's regulation governing access to medical records, *AR 40-66*,¹⁴⁸ controls access to individuals' medical records. As with the victim witness program in *AR 27-10*, counsel must understand the interplay between the regulation and MRE 513. *Army Regulation 40-66* states that "DA policy mandates that the confidentiality of patient medical information and medical records will be protected to the fullest extent possible. Patient medical information and medical records will be released only if authorized by law and regulation."¹⁴⁹ Under *AR 40-66*, medical information or medical records may be disclosed without patient consent "to officers and employees of DOD who have an official need for access to the record in the performance of their duties."¹⁵⁰ Nonmedical personnel who may need medical information or medical records for official reasons include "unit commanders; inspectors general; officers, civilian attorneys, and military and civilian personnel of the Judge Advocate General's Corps; military personnel officers; and members of the U.S. Army Criminal Investigation Command or military police performing official investigations."¹⁵¹ Thus, under *AR 40-66*, trial counsels, MPI investigators, CID agents, and com-

manders could access a victim's or witness's mental health records if they have an official need for the information.

There is "a disconnect between [MRE] 513 and *AR 40-66* because the regulation does not address the psychotherapist-patient privilege or outline any procedures in light of [MRE] 513."¹⁵² The failure of *AR 40-66* to address MRE 513 creates a loophole for individuals with an official need for the information to access mental health records that MRE 513 intended to protect. Given the psychotherapist-patient privilege that MRE 513 establishes for victims and witnesses, trial counsel and law enforcement personnel should refrain from using this loophole. If trial counsel or law enforcement personnel access this information, it may be easier for defense counsel to claim that MRE 513 does not protect the information. In particular, defense counsel may claim that the information is not protected under MRE 513 because its disclosure is constitutionally required (that is, by a Sixth Amendment right to confrontation or a Fifth Amendment right to due process).¹⁵³

Comparison to Air Force Instruction 44-109

Unlike the Army, the Air Force revised its regulations in light of MRE 513.¹⁵⁴ *Air Force Instruction (AFI) 44-109* "sets forth the rules concerning psychotherapist-patient confidentiality."¹⁵⁵ In contrast with *AR 40-66*, *AFI 44-109* prohibits disclosure of confidential communications to persons or agencies with an official need for the information when the evidentiary privilege of MRE 513 applies.¹⁵⁶

Air Force Instruction 44-109 also establishes procedures for responding to MRE 513 issues.¹⁵⁷ When a mental health provider receives a request for confidential communications for use in a criminal investigation or UCMJ proceeding, the provider must first determine whether there is an exception to allow disclosure.¹⁵⁸ If there is no applicable exception, then the

147. *Id.* para. 18-11(a).

148. U.S. DEP'T OF ARMY, REG. 40-66, MEDICAL RECORD ADMINISTRATION AND HEALTH CARE DOCUMENTATION para. 1-1 (10 Mar. 2003).

149. *Id.* para. 2-2.

150. *Id.* para. 2-4(a)(1).

151. *Id.* para. 5-23(e).

152. Major Bobbi L. Davis, *The Psychotherapist-Patient Privilege and the Military Accused* (2002) (unpublished LL.M. paper, The Judge Advocate General's School and Legal Center, U.S. Army) (on file with author).

153. See MCM, *supra* note 3, MIL. R. EVID. 513(d)(8).

154. The Navy, like the Army, has not revised its service regulations in light of MRE 513. Telephone interview with Lieutenant Sandra Johnson, Assistant Staff Judge Advocate, San Diego Naval Medical Center (Feb. 4, 2003).

155. U.S. DEP'T OF AIR FORCE, INSTR. 44-109, MENTAL HEALTH, CONFIDENTIALITY, AND MILITARY LAW para. 1.1 (1 Mar. 2000).

156. *Id.* para. 2.1. Paragraphs 2.2 to 2.4 of the AFI essentially reiterate the provisions of MRE 513. See *id.* paras. 2.2, 2.4.

157. See *id.* para. 2.5.

mental health provider informs the requestor “that the privilege is being claimed on behalf of the patient; that information will not be disclosed; and that any disagreement with this decision should be directed to the attention of the installation SJA.”¹⁵⁹ If either the mental health provider or the requestor has questions regarding the applicability of the privilege, the installation SJA must determine whether an exception applies and whether to disclose the information. Although the SJA’s determination is binding on the mental health provider and the requestor, the military judge still determines admissibility at trial.¹⁶⁰

Proposal for Revision of AR 40-66

In light of the inconsistency between MRE 513 and *AR 40-66*, the Army should consider revising this regulation. Health care personnel and military justice practitioners need clearer guidance for accessing mental health records in a way that is consistent with MRE 513. These revisions could also reduce the risk of unauthorized disclosures. Such revisions could also give effect to the intent of MRE 513—to protect confidential communications made by victims and witnesses.

The Army should consider adopting procedures similar to those under *AFI 44-109*. The procedures of *AFI 44-109* are clear and logical with one exception—they make the SJA the decision authority for the application of MRE 513. This creates a potential conflict of interest, particularly because the SJA is

required to give neutral and detached advice to the convening authority in military justice matters.¹⁶¹ A better practice might be to have the hospital or military treatment facility commander designated as the deciding official with a requirement to seek legal advice from a judge advocate before deciding. Implementing these procedures would help ensure that individuals cannot circumvent the intended protection of MRE 513 because of the regulation’s inconsistencies with MRE 513.

Conclusion

Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for the military. Military justice practitioners often focus on statements of the accused and whether MRE 513 protects such statements. However, MRE 513 also protects the statements victims and witnesses make to psychotherapists. The trial counsel plays a key role in this process. Victims and witnesses may authorize trial counsel to claim the privilege on their behalf. Trial counsel can seek interlocutory rulings from military judges to protect victim or witness communications to psychotherapists. Trial counsel and victim-witness liaisons also have an obligation under *AR 27-10* to protect the privacy of victims and witnesses. Trial counsel, victim-witness liaisons, and chiefs of military justice should ensure that victims and witnesses are aware of their rights under MRE 513’s psychotherapist-patient privilege.

158. *Id.* Of course, if the patient waives the privilege, the mental health provider can simply disclose the information without having to worry about whether an exception applies. *Id.* para. 2.5.2.

159. *Id.* para. 2.5.2.

160. *Id.* para. 2.5.3.

161. *See* MCM, *supra* note 3, R.C.M. 406.

Expanding Subpoena Power in the Military

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Introduction

National Academy of Public Administration (NAPA) Report

The NAPA¹ published a report in June 1999, which noted that military criminal investigative organizations (MCIOs) lacked direct subpoena authority.² The report described “a growing potential for use of subpoenas in investigations of Internet computer crime,”³ an observation which presumably focused on the expanding use of technology and automation within the military as well as in civilian society. The NAPA made the following recommendation:

With respect to civilian subpoena and arrest authorities, the Panel recognized the impediments to the MCIOs’ performance of a broader law enforcement role that involves civilians. The Panel believes the MCIOs should primarily be focused on enforcement of the UCMJ [Uniform Code of Military Justice] applicable to military personnel. Nonetheless, there are cases where these authorities would be useful for MCIOs. With respect to subpoena authority, *the Panel recommends that DOD [the Department of Defense] consider providing approval authority to the Services’ General Counsels or other appropriate Service official.*⁴

Recent Evaluation of the Adequacy of Subpoena Authority in the Department of Defense (DOD)

As a result of the NAPA report, and at the suggestion of the Air Force Office of Special Investigations,⁵ the Office of the Deputy Assistant Inspector General (IG), Criminal Investigative Policy and Oversight (CIPO), Office of the IG of the DOD, evaluated the adequacy of subpoena authority within the DOD. In 2001, the DOD IG reported its findings and recommendations.⁶ The study concluded that “[n]either the UCMJ [Uniform Code of Military Justice] nor the *MCM* [*Manual for Courts-Martial*] provides authority to issue subpoenas to obtain evidence prior to ‘referral of charges’ except in the case of a court of inquiry or deposition.”⁷ Also, the study noted that there is “a need for additional subpoena authority for investigations of UCMJ offenses.”⁸ Based on the survey results, the study determined “that the subpoena authority within the DOD in support of general crimes investigations, for offenses punishable under the UCMJ, is inadequate.”⁹

The CIPO evaluators interviewed and discussed the sufficiency of subpoena authority with program managers and staff members at the MCIO headquarters and the services’ Offices of The Judge Advocates General and the Staff Judge Advocate to the Commandant, U.S. Marine Corps.¹⁰ In addition, the CIPO conducted two surveys. One survey focused on members of each service MCIO.¹¹ The other survey targeted military attor-

1. The National Academy of Public Administration (NAPA) is an independent, nonpartisan, nonprofit organization comprised of former legislators, jurists, federal and state executives, and scholars that assists government and private agencies and organizations in research and problem solving. It was granted a congressional charter in 1984. OFFICE OF THE INSPECTOR GENERAL, DEP’T OF DEFENSE, CRIMINAL INVESTIGATIVE POLICY & OVERSIGHT, EVALUATION OF SUFFICIENCY OF SUBPOENA AUTHORITY WITHIN THE DEP’T OF DEFENSE IN SUPPORT OF GENERAL CRIMES INVESTIGATIONS 1 n.4 (15 May 2001) [hereinafter CIPO STUDY].

2. NATIONAL ACADEMY OF PUBLIC ADMINISTRATORS, ADAPTING MILITARY SEX CRIME INVESTIGATIONS TO CHANGING TIMES 20 (June 1999). The report states that military criminal investigative organizations (MCIOs) can and do request subpoenas through the Department of Defense Inspector General (DODIG) or appropriate civilian authorities. These subpoenas are primarily for fraud cases. This process creates a check on the MCIOs which can limit wanton uses of subpoenas in civil criminal investigations. It is mostly applicable to civilian and off-post investigations. *Id.*; see MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(e)(2)(C) (2002) [hereinafter MCM].

3. *Id.*

4. *Id.* at 23 (emphasis added).

5. Memorandum, Air Force Office of Special Investigations, to DOD/IG, subject: FY 2000 DOD/IG Project Plan (19 Apr. 1999).

6. CIPO STUDY, *supra* note 1, at 3.

7. *Id.* at 3.

8. *Id.* at 9.

9. *Id.* at 5.

neys from each service's Judge Advocate General's Corps (JAGC).¹²

Investigator and Military Attorney Survey Results

The CIPO study revealed a need for expanded subpoena authority. The MCIO agents rated the military search authorization; local, state, and federal search warrants; and consent "as the most frequently used and most highly effective mechanisms in supporting general crimes investigations."¹³ Twenty percent of the agents also "indicated that they 'often' or 'seldom' [as opposed to never] encountered instances where they felt unable to use any mechanism to compel production of evidence."¹⁴ The agents responded that although they needed to obtain evidence in larceny, drug, homicide or unattended death, and child maltreatment or mistreatment investigations, "they lacked a mechanism for doing so."¹⁵

Results of the JAGC survey paralleled those of the MCIO survey. Sixty-six percent of the military attorneys surveyed responded that they had "needed evidence prior to referral of charges to support an investigation of a crime cognizable under the UCMJ, but concluded [that] no mechanism was available to compel its production."¹⁶ Forty-one percent answered "often" or "seldom" [as opposed to never] when asked "if they had ever been involved with a general crimes investigation cognizable under the UCMJ [when] they could not successfully prosecute the case because they could not compel the production of cer-

tain evidence."¹⁷ Most importantly, a majority of the sixty-six percent who responded positively to the first query indicated "that the ability to issue or obtain a military trial subpoena prior to referral of charges would have benefited their case or resulted in a referral of charges."¹⁸

Review by the Joint Service Committee

On 16 June 2001, the DOD General Counsel referred the CIPO report to the Joint Service Committee (JSC).¹⁹ The JSC²⁰ reviewed the report and "determined that further review is necessary to consider several additional options considered appropriate for the pretrial stages of a criminal case and in support of the administration of military justice [during the next annual review]."²¹

While the NAPA, CIPO, and JSC indicated some necessity or at least some desire to study subpoena authority in the military, this article addresses the need to further expand it. This article: (1) traces the origins and development of subpoena power, to include its development in the United States and in the U.S. military; (2) describes current subpoena authority in the military, in both its judicial and administrative forms; (3) compares and contrasts this description with the current federal system's subpoena authority; (4) addresses the present military environment, which is conducive to expanding subpoena authority; and (5) evaluates possible proposals for such an expansion.

10. *Id.* at 12.

11. *Id.* at 5. Overall, 70% of the MCIO special agent population responded to the survey through a questionnaire posted on the World Wide Web. Seventy-five percent of agents from the U.S. Army Criminal Investigation Command (USACIDC) responded; 73% of the Air Force Office of Special Investigations (AFOSI) agents responded; and 60% of the Naval Criminal Investigation Service (NCIS) agents responded. *Id.*

12. *Id.* at 7. Seven hundred and fifty-three JAGC personnel participated in the survey. *Id.*

13. *Id.* at 6.

14. *Id.* Two thousand and twenty-three agents responded to the survey. Investigative experience levels of the responding agents were: less than one year, 10%; more than one year but less than three years, 17%; more than three but less than five years, 11%; more than five but less than seven years, 9%; and seven years or more, 52%.

15. *Id.* Types of needed evidence included bank, telephone, financial, and medical records. *Id.*

16. *Id.* at 7-8. Seven hundred and fifty-three military attorneys participated in the Internet survey in September 2000. The CIPO addressed it to JAGC personnel with military justice experience. Of the respondents, 239 had over seven years of military justice experience; 105 had over five but less than seven years; 142 had over three but less than five; and 181 had over one but less than three years of experience. Eighty-three indicated that they had less than one year of military justice experience. *Id.*

17. *Id.* at 8.

18. *Id.* at 7-8. The survey indicated that 408 attorneys gave that answer. *Id.*

19. Memorandum, U.S. Dep't of Defense, to Inspector General, U.S. Dep't of Defense, subject: Review of the Evaluation Report on the Sufficiency of Subpoena Authority within the Dep't of Defense in Support of General Crimes Investigations (Report No. CIPO2001S004) (20 Dec. 2002) [hereinafter DODIG GC Memo on Sufficiency of Subpoena Power].

20. The Joint Service Committee (JSC) on Military Justice, under the direction of the DOD General Counsel, reviews the *Manual for Courts-Martial* annually and proposes any legislative amendments to the UCMJ. U.S. DEP'T OF DEFENSE, DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE JSC ON MILITARY JUSTICE (8 May 1996).

21. DODIG GC Memo on Sufficiency of Subpoena Power, *supra* note 19.

History of Subpoena Authority

Origins of Subpoena Authority in England

Subpoena power originated in England, as part of the development from inquisitional to adversarial trial procedure. In the late medieval period, jurors tried criminal cases on their knowledge of the facts without hearing from witnesses.²² By the sixteenth century, it became obvious that juries could not make decisions solely from their own knowledge.²³ Courts, therefore, pursued outside, oral testimony. Oral testimony appeared relatively late in the common law courts, such as the King's Bench, due to the "firmness with which the common law adhered to the view that the jury were as much witnesses as judges of fact."²⁴ Chancery and other courts outside the sphere of common law allowed witnesses to give oral evidence.²⁵

As early as the 1400s, the Chancery used the subpoena process to secure witnesses' attendance and testimony.²⁶ The subpoena became the preferred instrument of the Council and the Chancery. Parliament, however, stated that the subpoena "was repugnant to the common law."²⁷

In the 1500s, the use of a compulsory subpoena writ may have caused a rapid increase in Chancery's activity. This increase in activity encouraged the introduction of compulsory process for witnesses in the common law courts.²⁸ The Statute of Elizabeth officially enacted this process:

If any person or persons upon whom any process out of any of the courts of record within this realm or Wales shall be served to testify or depose concerning any cause or matter depending in any of the same courts, and

having tendered unto him or them, according to his or their countenance or call, such reasonable sums of money for his or their costs or charges as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and a reasonable let or impediment to the contrary, that then the party making default shall forfeit £10 and give further recompense for the harm suffered by the party aggrieved.²⁹

"This statute did for testimony at common law what the subpoena had done for testimony more than one hundred years before,"³⁰ and formally recognized and supported the use of subpoenas in common law courts. Initially, the statute only applied to civil cases, but by 1679, under the Restoration, judges began to grant the criminally accused compulsory process by special order.³¹ At slow intervals, in 1695 and in 1701, general statutes guaranteed an accused this right.³²

Progression of Federal Subpoena Authority in the United States

As early as 1712, American colonial courts used subpoena authority.³³ In the United States after independence, subpoena authority developed further. The insertion of compulsory process into the Constitution secured defendants the rights that had previously existed only in state courts.³⁴ With the enactment of the first Judiciary Act in September of 1789, "the mode of proof by examination of witnesses . . . was regulated, and their [witnesses'] duty to appear and testify was recognized."³⁵ Justice Hughes stated that "the 'all writs' provision of section 14 of the Judiciary Act of 1789 comprehends the authority to issue sub-

22. Peter Western, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 78 (1974).

23. 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 131 (1966).

24. *Id.*

25. *Id.*

26. *Id.* at 184.

27. I.S. LEADAM & J.F. BALDWIN, SELECT CASES BEFORE THE KING'S COUNCIL, 1243-1482, 36 (1918).

28. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2191 n.28 (McNaughton rev. 1961).

29. Statute of Eliz., 5 Eliz. I, c. 9, § 12 (1562-63) (Eng.).

30. WIGMORE, *supra* note 28, § 2190, at 65.

31. *Id.* at 67.

32. *Id.*

33. *Id.* at § 2190 n.25. The earliest American colonial compulsory statute was probably that of South Carolina in 1712. *Id.*

34. Lester B. Orfield, *Subpoena in Federal Criminal Procedure*, 13 ALA. L. REV. 1, 11 (1960).

35. *Id.* at 34 (quoting *Blair v. United States*, 250 U.S. 273, 280-281 (1919) (quoting *Amey v. Long*, 9 East, 484, Section 724)).

poena *duces tecum*, for ‘the right to resort to means competent to compel the production of written, as well as oral, testimony.’”³⁶ Justice Hughes reasoned that such testimony “seems essential to the very existence and constitution of a court of common law.”³⁷ In time, case law in the United States extended compulsory process “not only to having witnesses subpoenaed to testify, but also to production of documents.”³⁸ Chief Justice Marshall noted: “[a] subpoena *duces tecum* varies from an ordinary subpoena only in this; that a witness is summoned for the purpose of bringing with him a paper in his custody.”³⁹

Subpoena authority in the United States further expanded during the late nineteenth and twentieth centuries. Case law during this period described subpoenas as instruments “issued for the preliminary examination, grand jury proceedings, deposition, and the trial.”⁴⁰ A court even stated that “[t]he process of subpoena is always at the command of the United States District Attorney without the authorization of this court.”⁴¹ Then, in the 1940s, an advisory committee drafted the *Federal Rules of Criminal Procedure (FRCP)*. The Supreme Court adopted the committee’s ninth draft.⁴² Rule 19, currently Rule 17, addressed subpoena power in the federal courts.⁴³

*Development of Subpoena Authority in the United States Military*⁴⁴

As in the federal courts, subpoena authority in the military also evolved from the English tradition. The Crown and the annual Mutiny Act developed rules and regulations that the British armed forces used to administer legal procedure.⁴⁵ The Continental Congress adopted its military laws based on the laws and customs governing British armed forces.⁴⁶ In 1775, the Continental Congress adopted the American Articles of War⁴⁷ and the Rules for the Regulation of the Navy of the United States Colonies.⁴⁸ Like their British counterparts, the American Articles of War, 1775, and the Articles of War, 1776,⁴⁹ contained no provisions for compelling a witness to attend courts-martial.⁵⁰ The Articles for the Government of the Navy similarly lacked such provisions.⁵¹

The Continental Congress addressed subpoena authority for the U.S. military in 1779 when it adopted this significant language:

Resolved, that it be recommended to the executive authority of their respective states, upon the application of the judge advocate for that purpose, to grant proper writs requiring and compelling the person or persons whose attendance shall be requested by the said judge, to appear and give testimony in any cause depending before a court-martial;

36. Orfield, *supra* note 34, at 42 (citing *In re Storrer*, 63 F. 564, 565 (N.D. Cal. 1894)).

37. *Id.* (quoting *Am. Lithographic Co. v. Werkmeister*, 221 U.S. 603, 609 (1911)).

38. *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va.) (No. 14,692d).

39. *Id.* at 35.

40. Orfield, *supra* note 34, at 36 (citing *Hale v. Henkel*, 201 U.S. 43 (1906); *Crompton v. United States*, 138 U.S. 361 (1891); *United States v. Hofmann*, 24 F. Supp. 847, 848 (S.D.N.Y. 1938); *United States v. Beavers*, 125 F. 778, 779 (S.D.N.Y. 1903)).

41. *Id.* at 37 (citing *United States v. Barefield*, 23 F. 136, 137 (E.D. Tex. 1885)).

42. *Id.* at 3.

43. *Id.* at 3-10.

44. See Brief for the Dept. of the Army at A1, *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982) (No. 39914) [hereinafter *Bennett Brief*].

45. *Id.* (citing *MILITARY OF DEFENCE, MANUAL OF MILITARY* pt. II, §1 (12th ed. 1972); Stuart-Smith, *Military Law: Its History, Administration and Practice*, 85 L.Q. REV. 478 (1969); 1 *HOLDSWORTH, supra* note 23; see *WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS* 23 (2d ed., 1920 reprint)).

46. 3 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 409-10 (L. Butterfield ed. 1964).

47. Res. of June 30, 1775, 2 J. CONT. CONG. 111 (1905), as amended by Res. of November 7, 1775, 3 J. CONT. CONG. 330 (1905).

48. Res. of November 28, 1775, 3 J. CONT. CONG. 378 (1905).

49. Res. of September 20, 1776, 5 J. CONT. CONG. 788 (1906).

50. See *Bennett Brief*, *supra* note 44, at 8.

51. *Id.* at 10.

and that it be recommended to the legislatures of the several states to vest the necessary powers for the purposes aforesaid in their executive authorities, if the same be not already done.⁵²

This resolution fell into disuse⁵³ and by the mid-nineteenth century, the consensus opinion was that the American Articles of War did not permit the compulsion of civilian witnesses to attend courts-martial.⁵⁴

In 1863, Congress created the power to subpoena nonmilitary witnesses that most resembles its current form:

That every judge-advocate of a court-martial or court of inquiry hereafter to be constituted, shall have the power to issue the like process to compel witnesses to appear and testify, which courts of criminal jurisdiction within state, territory, or district where such military courts shall be ordered to sit may lawfully issue.⁵⁵

This empowered judge advocates to issue subpoenas to civilian witnesses. The attorney general, however, did not interpret this provision to apply to Navy courts-martial because of the words “military courts.”⁵⁶ Congress remedied this in 1909 with legislation containing language mirroring the 1863 statute:

Sec. 11. That a naval court-martial or court of inquiry shall have power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or

District where such naval court shall be ordered to sit may lawfully issue.⁵⁷

Compulsory process in the Navy did not change until Congress enacted the UCMJ.⁵⁸

The Articles of War underwent revisions concerning compulsory process before the enactment of the UCMJ in 1916 and then in 1920.⁵⁹ The 1928 *Manual for Courts-Martial* reflects these revisions:

Article 22. Process to Obtain Witnesses. Every trial judge advocate of a general or special court-martial and every summary court-martial shall have the power to issue like process to compel witnesses to appear and testify which courts of the United States having criminal jurisdiction may lawfully issue; but such process shall run to any part of the United States, its territories, and possessions.⁶⁰

Congress intended these changes “to give courts-martial subpoena power co-extensive with federal courts.”⁶¹ In addition, the 1928 *MCM* described the issuance of process regarding compelling a witness to appear for preliminary examination and it specified a subpoena’s need to address items in detail when it required a witness to bring documents.⁶²

Current Military Subpoena Authority versus Federal Subpoena Authority

When Congress adopted the UCMJ, it “restated it[s] compulsory process and deposition policies”⁶³ in the form of Article

52. Res. of November 16, 1779, 15 J. CONT. CONG. 1272, 1277-78 (1909).

53. Bennett Brief, *supra* note 44, at 9 n.9.

54. *Id.* at 10.

55. United States v. Bennett, 12 M.J. 463, 467 (C.M.A. 1982) (citing Act of Mar. 3, 1863 § 25, 12 Stat. 754).

56. 19 Op. Att’y Gen. 501 (1890) (concluding that “military courts” apply “exclusively to the Army or land service” and not the naval service and “that naval courts-martial or their judge advocates have not the power to compel civilians not subject to the articles for the government of the Navy to appear and testify before such courts”).

57. Bennett Brief, *supra* note 44, at 12 (citing Act of Feb. 16, 1909, ch. 131, § 11, 35 Stat. 621).

58. See UCMJ, 1951.

59. See Bennett Brief, *supra* note 44, at 14 n.16 (“[The] Articles of War, 1916, ch. 418, §3, 39 Stat. 650, and the Articles of War, 1920, ch. 227, C.II, 41 Stat. 787, entirely recodified American military law governing the Army.”).

60. MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 1, art. 22 (1928) [hereinafter 1928 MCM].

61. Bennett Brief, *supra* note 44, at 16.

62. 1928 MCM, *supra* note 60, at 16.

63. Bennett Brief, *supra* note 44, at 19.

46.⁶⁴ Although it is now common for most military practitioners to obtain civilian evidence through the voluntary cooperation of the individuals or entities concerned,⁶⁵ Congress provided Article 46 for cases in which military practitioners needed compulsory process:

Art. 46. Opportunity to obtain witnesses and other evidence. The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealth, and possessions.⁶⁶

Article 46's authority results from the legislative branch's power to enact laws under Article I of the Constitution. Its authority is based on the Sixth Amendment right of a criminal accused to compel the attendance of witnesses.⁶⁷ Case law has affirmed the Sixth Amendment's application to courts-martial.⁶⁸ While its origins lie with Congress, the authority of Article 46 is similar to that possessed by "those courts created pursuant to Article III of the Constitution,"⁶⁹ in which federal subpoena authority under Rule 17, *FRCP*, applies.⁷⁰ While Article 46 and Rule 17 are from two different sources, they have similar objectives. However, the federal courts have much

more flexibility in their application of subpoena authority, especially before the formal initiation of a case or indictment.⁷¹

RCM 703(e)(2)

Rules for Courts-Martial (RCM) 701 and 703 both implement Article 46. Specifically, RCM 703(e)(2) addresses three elements: (1) the presence of witnesses who are not on active duty;⁷² (2) the contents of a subpoena, to include a directive to produce books, papers, documents, or other objects for inspection by the parties;⁷³ and (3) the subpoena issuing authority. Rule for Courts-Martial 703(e)(2)(C) states:

Who May Issue. A subpoena may be issued by the summary court-martial or trial counsel of a special or general court-martial to secure witnesses or evidence for that court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.⁷⁴

Military practitioners often misunderstand this third provision. Like a federal subpoena that a prosecutor usually initiates and a court clerk then issues, a trial counsel issues a military subpoena. While considered to be a judicial subpoena⁷⁵ like a federal judicial subpoena, a subpoena issued under this rule cannot compel a witness to appear at a pre-trial examination or interview until after the referral of charges.⁷⁶ Referral is the order of a convening authority sending charges against an

64. See UCMJ art. 46 (2002).

65. FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT MARTIAL PROCEDURE 2149 (3d ed. 1999).

66. UCMJ art. 46.

67. *Comparative Analysis, Federal Rules of Criminal Procedure and Military Practice and Procedure*, Committee on Criminal Justice and the Military, Section of Criminal Justice, A.B.A 48 (1982) [hereinafter *ABA Analysis*]; see U.S. CONST. amend. VI.

68. *Id.* (citing *United States v. Manos*, 37 C.M.R. 274 (C.M.A. 1967); *United States v. Sweeney*, 34 C.M.R. 379 (C.M.A. 1964); *United States v. Thornton*, 24 C.M.R. 256 (C.M.A. 1957)).

69. Bennett Brief, *supra* note 44, at 20 (citing *United States v. Frischolz*, 36 C.M.R. 306 (C.M.A. 1966)); see U.S. CONST. art. III.

70. FED R. CRIM. P. 17.

71. E-mail from Gregg Nivala, Assistant U.S. Attorney, Eastern District of Va. (Dec. 11, 2002) (on file with the author). Mr. Nivala stated that ninety-nine percent of subpoenas are used for pre-indictment purposes other than for attendance of witnesses at trial. *Id.*

72. MCM, *supra* note 2, R.C.M. 703(e)(2)(A).

73. *Id.* R.C.M. 703(e)(2)(B).

74. *Id.* R.C.M. 703(e)(2)(C).

75. *United States v. Curtin*, 44 M.J. 439, 441 (1996). A trial counsel's subpoena is a judicial subpoena within the meaning of the Right to Financial Privacy Act, 12 U.S.C. § 2407 (2000). *Id.*

76. CIPO STUDY, *supra* note 1, at 4.

Depositions

accused to a specific court-martial.⁷⁷ It requires: “a convening authority who is authorized to convene the court-martial and is not disqualified . . . ; preferred charges which have been received by the convening authority for disposition . . . ; and a court-martial convened by that convening authority or a predecessor.”⁷⁸ There is no trial counsel or court-martial within the meaning of RCM 703(e)(2)(C) until a convening authority has referred a case to trial and counsel is detailed to the court-martial.⁷⁹ By implication, there is no trial counsel subpoena authority in a military case until after referral of the charges.

This limitation may cause great frustration for both military investigators and lawyers. Investigators do not have critical subpoena authority during the principal and formative parts of investigations.⁸⁰ A number of factors constrain trial counsel, who lack subpoena authority before referral, including impediments to timeliness, evidence gathering, case integrity, and case perfection.⁸¹ Unlike the federal system, in which prosecutors have access to pre-indictment and post-indictment subpoena authority; military prosecutors cannot utilize the judicial subpoena until after referral. By then, the authorization power is often insufficient and untimely; either the trial is imminent, “or worse yet, justice might never be served because evidence could not be compelled and charges are not preferred and the case is not referred for trial.”⁸² Therefore, military practitioners, unlike federal prosecutors, must often consider alternative approaches.

Under RCM 702, depositions are one alternative to trial counsel subpoena authority. While “an officer detailed to take a deposition to secure witnesses or evidence”⁸³ may also issue subpoenas pursuant to RCM 703(e)(2)(C), the provisions of RCM 702 apply only after the preferral of charges and before the referral of charges. In addition, the rule does not permit a deposition unless there are “exceptional circumstances . . . [and] it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.”⁸⁴ Although they are not very common, depositions are an effective method to secure testimony, especially from witnesses who are located outside the military jurisdiction.⁸⁵ The requisite “exceptional circumstances” and “interest[s] of justice,” however, do not make depositions practical for ordinary courts-martial.

DOD IG Subpoenas

Another alternative to traditional subpoenas are administrative subpoenas. Under the Inspector General Act of 1978,⁸⁶ the IG has the authority to issue administrative subpoenas also known as DOD IG subpoenas. A DOD IG subpoena provides a significant tool for obtaining “the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned.”⁸⁷

77. MCM, *supra* note 2, R.C.M. 601(a).

78. *Id.*

79. *See* UCMJ art. 27 (2002); MCM, *supra* note 2, R.C.M. 501(b).

80. CIPO STUDY, *supra* note 1, at 4.

81. *Id.* For further input from JAGC attorneys, see responses from individual attorneys surveyed by CIPO. *Id.*

82. E-mail from Special Agent (SA) Scott D. Russell, CIPO, DOD IG (Feb. 19, 2003) [hereinafter Russell E-mail] (on file with author).

83. MCM, *supra* note 2, R.C.M. 703(e)(2)(C).

84. *Id.* R.C.M. 702(a).

85. Interview with Major John T. Hyatt, 51st Graduate Course Student at the Judge Advocate General School (Dec. 19, 2002) (on file with author). Major Hyatt described how he organized a deposition for securing the testimony of a U.S. witness for a court-martial in Europe. He also described the organization and execution as requiring great effort and coordination with his office and another installation legal office in the United States. *Id.*

86. 5 U.S.C. app. 3, § 6(a)(4) (2000).

87. *Id.*

The DOD IG subpoenas have several advantages. Unlike a federal judicial or military justice subpoena, the DOD IG subpoena is administrative and does not “require a showing of ‘probable cause.’”⁸⁸ The standard for issuing a DOD IG subpoena “has been described as ‘mere suspicion’ or ‘official curiosity.’”⁸⁹ A DOD IG subpoena “may be issued in support of criminal, civil, and administrative investigations or audits.”⁹⁰ Consequently, the DOD IG subpoena may be useful for acquiring such items as checking account records, bank records covered by the Right to Financial Privacy Act (RFPA),⁹¹ brokerage records, and various records of government contractors.⁹²

There are some disadvantages to the DOD IG subpoena system, however. The DOD IG subpoena is limited in scope because its focus is fulfilling the IG’s functions, especially those relating to the detection, prevention, and investigation of fraud, waste, and abuse.⁹³ Criminal investigations generally do not fit within these parameters. As a result, investigators cannot use a DOD IG subpoena to produce non-documentary phys-

ical evidence (such as a weapon) or to compel testimony.⁹⁴ Moreover, investigators who must also follow their own regulations,⁹⁵ believe that these MCIO regulations and the IG documentary requirements⁹⁶ are too lengthy, cumbersome, and difficult to handle.⁹⁷

The RFPA⁹⁸ provides privacy protection for customers’ financial records, which are often the same records that military practitioners must acquire during an investigation or in preparation for a court-martial. Unfortunately, the RFPA prohibits unfettered access by the government⁹⁹ by requiring government authorities to follow five notice and challenge procedures for customers.¹⁰⁰ A government authority may obtain access to financial records after obtaining one of the following: (1) customer consent;¹⁰¹ (2) an administrative subpoena;¹⁰² (3) a search warrant;¹⁰³ (4) a judicial subpoena;¹⁰⁴ or (5) a formal written request.¹⁰⁵

88. Major Stephen Nypaver III, *Department of Defense Inspector General Subpoena*, ARMY LAW., Mar. 1989, at 17 (citing *United States v. Westinghouse Elec. Corp.*, 615 F. Supp. 1163, 1182 (W.D. Pa. 1985)).

89. *Id.* (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 642, 652 (1950)).

90. *Id.* at 18 (citing *United States v. Westinghouse Elec. Corp.*, 615 F. Supp. 1163, 1182 (W.D. Pa. 1985)).

91. 12 U.S.C. §§ 3401-3422 (2000).

92. Nypaver, *supra* note 88, at 18.

93. *Id.*

94. CIPO STUDY, *supra* note 1, at 4.

95. See CRIMINAL INVESTIGATION COMMAND REG. 195-1, CRIMINAL INVESTIGATION OPERATIONAL PROCEDURES ch. 5 (1 Oct. 1994) (providing detailed guidance on the procedures to obtain subpoenas) [hereinafter CIDR 195-1]; U.S. DEP’T OF NAVY, SEC’Y OF THE NAVY INSTR. 5520.3B, CRIMINAL AND SECURITY INVESTIGATIONS AND RELATED ACTIVITIES WITHIN THE DEP’T OF THE NAVY para. 3 (4 Jan 1993) [hereinafter SECNAV INSTR. 5520.3B]; U.S. DEP’T OF AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS (AFOSI) INSTR. 71-106, GENERAL INVESTIGATIVE METHODS ch. 14 (21 Dec. 1998) (pending revision) [hereinafter AFI 71-106]. Military practitioners may not understand how to acquire or even use the DOD IG subpoena properly—the U.S. Army CID Group Judge Advocate, located in each of the major worldwide regions, can provide significant assistance in preparing and coordinating a request for a DOD IG subpoena. He or she can also provide training in its preparation and use.

96. Lieutenant Colonel Frank Albright & Special Agent Thomas Gribben, DOD IG Subpoena Process PowerPoint Presentation (31 Jan. 2001) (on file with author) (explaining the requirements for subpoena consideration: request memorandum; Privacy Act notice; certificate of compliance; draft subpoena; and letter from investigator to recipient).

97. See CIPO STUDY, *supra* note 1 (illustrating this viewpoint with responses from individual investigators that CIPO surveyed) (on file with author and CIPO).

98. 12 U.S.C. §§ 3401-3422; see U.S. DEP’T OF DEFENSE, DIR. 5400.12, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS FOR USE BY DOD ENTITIES (6 Feb. 1980) [hereinafter DOD DIR. 5400.12] (implementing the RFPA); U.S. DEP’T OF ARMY, REG. 190-6, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS (Jan. 1982) (setting forth the Army’s regulatory implementation of RFPA). The RFPA and DOD DIR. 5400.12 specify procedures, which a DOD government authority must follow to obtain individuals’ financial records in an investigation or court-martial. A judge advocate or trial counsel is a government authority under the definition in the RFPA. Likewise, an OSI agent, security police officer, or a first sergeant is a government authority under the RFPA. *Id.*

99. 12 U.S.C. § 3401-3422 (2000); Major Jane M.E. Peterson, *Right to Financial Privacy*, SPECIAL EDITION AIR FORCE ADVOCACY CONTINUATION EDUC. (ACE) NEWSLETTER (USAF/ACE PROGRAM), 31 May 2000, at 8-9 (outlining exceptions for the military practitioner).

100. Peterson, *supra* note 99, at 4.

101. *Id.* at 8-9. It is DOD policy to request consent before using the other access procedures unless doing so would compromise or harmfully delay a legitimate law enforcement inquiry. In order to comply with the RFPA, the government authority must request consent in writing, specifically describe the records sought, specify the purpose of the request, and fully explain the individual’s rights under the RFPA. DoD DIR. 5400.12, *supra* note 98, para. 4.1.

102. Peterson, *supra* note 99, at 8-9. The DOD IG must comply with the RFPA requirements when issuing an administrative subpoena for financial records. *Id.*

Even in cases when military practitioners obtain a DOD IG subpoena, a government authority must provide the bank customer a complete copy and written notice of the subpoena, which explains its purpose and the customer's challenge procedures under the RFPA.¹⁰⁶ Practitioners may find this requirement burdensome, especially if the investigator or trial counsel is trying to prevent the subject of the investigation from knowing about it. The RFPA also mentions other options that are often unavailable to a military investigator or trial counsel, such as a military judicial subpoena, customer consent, or formal written request.¹⁰⁷ There are several problems with these options. First, the military judicial subpoena is only enforceable after referral. Second, customer consent or a formal written request is not enforceable at all. Furthermore, military practitioners' lack of familiarity with RFPA procedures¹⁰⁸ may result in governmental liability.¹⁰⁹ Because the RFPA can be detrimental to an investigation, practitioners should heed its provisions carefully.

Federal Subpoena Authority

Rule 17 of the *FRCP*, like RCM. 703, addresses subpoena authority. Rule 17(a) states as follows:

A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and

sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served . . .¹¹⁰

Rule 17(c) also addresses the production of documentary evidence and objects:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.¹¹¹

Rules 17(c) and 17 (a), respectively, appear similar to RCM 703(e)(2)(C) and RCM 703(e)(2)(B). For example, the trial counsel's RCM 703(e)(2)(B) authority in "the military justice system parallels the functions of the clerk of court of the United States District Court who issues subpoenas for that court as a ministerial act."¹¹² Likewise, there are similarities between Rule 17(c) and Article 46, UCMJ, which states that "[p]rocess issued in court-martial cases to compel . . . the production of other evidence shall be similar to that which courts of the

103. *Id.* A search warrant for financial records is only available if probable cause exists, but a government authority can issue it at any stage in the court-martial proceedings. To comply with the RFPA, a military commander or magistrate cannot issue the subpoena. *Id.*

104. *Id.* A trial counsel subpoena for financial records is available after referral of charges. After referral, the accused's financial records fall under an exception to the RFPA and it does not apply. *Id.*

105. *Id.* A formal written request for financial records is only statutorily available if an administrative subpoena is not available. The government authority must comply with the RFPA. *Id.*

106. *Id.* at 8.

107. 12 U.S.C. §§ 3404, 3407-08, 3413(3).

108. See Captain Donald W. Hitzeman, *Due Diligence in Obtaining Financial Records*, ARMY LAW., July 1990, at 39; Mary C. Hutton, *The Right to Financial Privacy Act: Tool to Investigate Fraud and Discover Fruits of Wrongdoing*, ARMY LAW., Nov. 1983, at 17.

109. See Captain Daryl B. Witherspoon & Jennifer Solomon, *Litigation Division Notes, Trial Counsel's Pre-Referral Subpoena Puts Bank at Risk*, ARMY LAW., Mar. 2003, at 35 (describing potential liability of the Army after *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002)). See also, Russell E-mail, *supra* note 82. According to SA Russell, the notice requirement may be detrimental to an investigation, but not necessarily detrimental to the IG subpoena system. Special Agent Russell noted that the subpoena program manager notifies any MCIO agent who is ignorant of the RFPA requirements and attempts to get an IG subpoena for RFPA records. The manager prepares the proper documents and explains procedures to avoid liability problems. *Id.*

110. FED. R. CRIM. P. 17(a).

111. *Id.* R. 17(c).

112. *United States v. Curtin*, 44 M.J. 439, 441 (1996). In a concurring opinion, Chief Judge Cox held that "[t]he fact that the trial counsel acted as a ministerial or administrative arm of the court-martial (as the clerk of court does for a federal district court) does not deprive the subpoena of its judicial character or make it an 'administrative summons.'" *Id.*

United States having criminal jurisdiction may lawfully issue.”¹¹³

Rule 17’s application, however, is different from its military counterpart in three important respects. First, the military’s equivalent of the federal indictment is less flexible; instead of one step, it contains three: the preferral of charges, the Article 32 hearing or investigation, and the referral of charges.¹¹⁴ Second, and probably most significantly, Rule 17 is used extensively to issue grand jury subpoenas before indictment,¹¹⁵ primarily to acquire documentary information.¹¹⁶ In the military, a trial counsel cannot issue a subpoena before referral. Third, the court-martial convening authority can order an Article 32 investigation, the military’s nearest equivalent to a grand jury, but unlike a federal prosecutor in a grand jury proceeding, an Article 32 investigating officer has no subpoena authority.¹¹⁷

Expanding Military Subpoena Authority

Military Law Enforcement and the Legal Community Desire Expanded Authority

The CIPO study demonstrates the need to expand subpoena authority. This evaluation provides insight into military practitioners’ perspectives. The comments of law enforcement officers and JAGC attorneys regarding subpoena authority are revealing. Their comments reflect views ranging from frustration to ignorance. Agents responded that there is “no adequate mechanism . . . available to compel the production of evidence needed to complete their investigations.”¹¹⁸ Military attorneys overwhelmingly “believed that the availability of military subpoena authority similar to that outlined in [RCM 703] but available prior to referral of charges, *would enhance the military justice system.*”¹¹⁹ This conclusion was not limited to prosecutors. Most of the surveyed JAGC defense counsel also agreed

that “subpoena authority similar to that outlined in [RCM 703] should be available prior to referral of charges.”¹²⁰

Legal Community’s Current Understanding of Available Subpoena Authority

Military practitioners’ frustration over the lack of subpoena authority may stem from several problems. Generally, subpoena authority is either: (1) misunderstood; (2) unwieldy; or (3) circumvented by military attorneys. The following cases are a mandate for change.

United States v. Byard¹²¹

More than seven months after preferral, Lieutenant Colonel Frederick B. Byard moved to dismiss charges because the government did not comply with the 120-day speedy trial rule. The delay resulted, in part, from the government’s failure to obtain evidence. Although the trial counsel had attempted to acquire the accused’s financial records after the preferral of charges in August 1985, the accused had “refused to consent to their release, the United States Attorney had refused to issue subpoenas on the military prosecutor’s behalf, and the financial institution had refused to release the records without either . . . [the accused’s] consent or a court order.”¹²² On 21 March 1986, the trial counsel requested a continuance because neither he nor the court had the power to issue a subpoena until after referral. The trial counsel argued that “[t]he government is aware of no other mechanisms for getting those records.”¹²³ The military judge granted the continuance. The Army Court of Military Review (ACMR) ordered a limited evidentiary hearing. At the hearing, the government conceded that the DOD IG had the power to issue subpoenas. The military judge who conducted the hearing found that the trial counsel actually knew about the DOD IG subpoena power but chose not to use it to obtain records.¹²⁴

113. UCMJ art. 46 (2002); see ABA ANALYSIS, *supra* note 67, at 49.

114. ABA ANALYSIS, *supra* note 67, at 15.

115. See Email from Greg Nivala, *supra* note 71.

116. E-mail from Robert Don Gifford, Assistant U.S. Attorney, District of Nev. (Dec. 12, 2002) (on file with author).

117. See MCM, *supra* note 2, R.C.M. 405.

118. CIPO STUDY, *supra* note 1, at 5-6.

119. *Id.* at 9 (emphasis added). Of 753 JAGC attorneys surveyed, 696 gave this response. *Id.*

120. *Id.* Of 753 JAGC attorneys surveyed, 44 were defense counsel and 37 gave this response. *Id.*

121. 29 M.J. 803 (A.C.M.R. 1989).

122. *Id.* at 805.

123. *Id.*

124. *Id.*

The ACMR found that the government was not entitled to any exclusion of the delay and that the government violated the accused's right to a speedy trial.¹²⁵ The court found "that the government's decision was premised upon a calculated estimate of the time required for referral balanced against its desire to avoid involving the Office of the Department of Defense Inspector General and its desire to avoid the requirements of the Right to Financial Privacy Act of 1978."¹²⁶ The court found that the government had other available alternatives such as the DOD IG subpoena and the deposition.¹²⁷

Byard exemplifies the difficulty of trying to subpoena records quickly and efficiently before trial. It demonstrates practitioners' lack of knowledge about alternative subpoena authorities, especially after referral. Although the trial counsel initially argued ignorance, he later appeared to avoid any alternative mechanisms, including the DOD IG subpoena and the deposition subpoena. The trial counsel's willful circumvention of the RFPA resulted in a dismissal of charges. The case shows how U.S. attorneys may be unable to provide subpoena assistance for military cases.¹²⁸ If there are no proceedings pending in federal district court or under investigation by a federal grand jury, as presumably was the case in *Byard*, it is unlikely that a U.S. attorney will be able to coordinate the issuance of a federal subpoena.¹²⁹

Flowers v. First Hawaiian Bank¹³⁰

The Army court-martialed Sergeant Major (SGM) Flowers for larceny while he was stationed at Schofield Barracks, Hawaii.¹³¹ During the Article 32 investigation, the government

issued a subpoena to the First Hawaiian Bank "requesting all bank records for an account held jointly by the Flowers. The subpoena stated on its face that it was a subpoena in an Article 32 proceeding."¹³² The bank released his records but did not inform SGM Flowers of his rights under RFPA. The Army ultimately dismissed the court-martial charges.¹³³

Sergeant Major Flowers filed a complaint against the bank, alleging that it violated the RFPA when it released his bank records to trial counsel. The "district court held that the Article 32 proceeding was within the government litigation exemption"¹³⁴ and found in favor of the bank. Sergeant Major Flowers moved for leave to amend the complaint to add the Army as a defendant. The district court denied the motion.¹³⁵ Sergeant Major Flowers then brought a separate action against the Army in the U.S. District Court for the District of Hawaii (District Court). The District Court found that the bank did not violate the RFPA's exemption for information that was disclosed in the course of litigation between the government and private citizen. The District Court found in favor of the bank, in part, because the Article 32 proceeding was a form of litigation and granted its motion for judgment on the pleadings.¹³⁶ Sergeant Major Flowers appealed to the Court of Appeals for the Ninth Circuit (Ninth Circuit).¹³⁷ On appeal, the Army argued that the

[subpoena was] exempt from the Right to Financial Privacy Act ("RFPA") . . . [because] Section 3413(e) of RFPA provides that the statute does not apply when the government seeks financial records *under* court rules comparable to the Federal Rules of Civil or Criminal Procedure in connection

125. *Id.* at 807.

126. *Id.* at 806.

127. *Id.* at 807.

128. The case does not explain the degree of coordination, if any, between the trial counsel and the U.S. attorney. Often, military investigators, especially in joint investigations, will acquire federal subpoenas for their use, but the purpose behind the subpoena issuance is for the further development of a federal, not a military case.

129. E-mail from Gregg Nivala, Assistant U.S. Attorney, Eastern District of Va. (Dec. 13, 2002); E-mail from Robert Don Gifford, Assistant U.S. Attorney, District of Nev. (Feb. 24, 2003) (on file with author).

130. *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002); see Witherspoon & Solomon, *supra* note 108, at 38 (identifying "a need to update the UCMJ and the Rules for Courts-Martial to grant trial counsel or investigating officer subpoena authority at Article 32 proceedings").

131. *Flowers*, 295 F.3d at 969.

132. *Id.* at 970.

133. *Id.* "The administrative record revealed that Sergeant Major Flowers chose to accept adjudication under Article 15 and agreed to retire in lieu of trial by court martial." Witherspoon & Solomon, *supra* note 108, at 36 (citing the administrative record at 157-58, 162-63 in *Flowers*, 295 F.3d 966).

134. *Id.*

135. *Id.*

136. *Flowers*, 295 F.3d at 969.

137. *Id.* at 970.

with litigation between the government and the person whose records are sought.¹³⁸

The following language illustrates this argument:

The fact that the subpoena was not specifically authorized by the UCMJ or the RCM does not mean that the subpoenaed records were not sought “under” those rules. In common legal usage, a suit arises under a statute even if the suit fails to state a valid claim under that statute. *Ardestani v. INS*, 502 U.S. 129, 135 (1991), held that “under” a statute means “subject to” or “governed by” that statute. Here, the records were sought by a subpoena that was “subject to” and “governed by” the UCMJ and the RCM, even though it turned out not to have been authorized by them. Indeed, the very fact that we refer to the UCMJ and the RCM to determine whether or not the subpoena was authorized confirms that the demand for records was made “under” those sources of law. Certainly the officer who issued the subpoena purported to be acting under the authority of the UCMJ and the RCM, and the subpoena appeared to the Bank to have been issued under them.¹³⁹

The Ninth Circuit reversed and remanded the case, holding that “[n]either the Federal Rules of Civil or Criminal Procedure, the UCMJ, the RCM, nor any other rule authorizes the use of a subpoena in such a proceeding.”¹⁴⁰

Flowers demonstrates the need to expand subpoena authority. Like *Byard*, *Flowers* represents the inappropriate exercise of subpoena authority under the current UCMJ and RCM. It also identifies what could be a common misperception held by trial counsel—that they have the authority to issue a subpoena for an Article 32 investigation before referral. *Flowers* also demonstrates the potentially high litigation costs to the Army and may reflect a new receptiveness to rules implementing subpoena authority earlier in criminal prosecutions. An unknown

number of practitioners probably already believe that this authority is implied.

Expanding Military Subpoena Authority

Amend RCM 703(e)(2)(C)

The CIPO study asked, “[i]f a new military investigative subpoena authority was added to the UCMJ, who should issue/approve the subpoena?”¹⁴¹ Over one third of the participants responded, “trial counsel.”¹⁴² Their response suggests the need for a change to RCM 703(e)(2)(C). The current language states:

Who May Issue: A subpoena may be issued by the summary court-martial, or trial counsel of a special or general court-martial to secure witnesses or evidence for that court-martial proceeding. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.¹⁴³

A more effective provision might state:

Who May Issue: A subpoena may be issued by the summary court-martial, or trial counsel *after preferal of charges* to secure witnesses or evidence for *possible* court-martial proceeding. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.¹⁴⁴

By not designating a specific level of court-martial, the proposal removes the referral requirement. It also gives trial counsel post-preferal subpoena authority.

Such a change does not require congressional action. Arguably, it requires only executive action.¹⁴⁵ This change aligns the military rules with Rule 17 of the *FRCP*, which states that a

138. Brief of Amici Curiae for the United States at 11, *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002) (No. 00-15635) (emphasis added).

139. *Id.* at 12.

140. *Flowers*, 295 F.3d at 974. The District Court has not yet resolved the issues remanded by the Ninth Circuit.

141. CIPO STUDY, *supra* note 1, at 9.

142. *Id.* Over 200 JAGC attorneys gave this response.

143. MCM, *supra* note 2, R.C.M. 703(e)(2)(C).

144. Email from Scott Russell, *supra* note 82. According to SA Russell, some proponents to expand subpoena argue that it should cover the period prior to preferal, because Rule 17, FED. R. CRIM. P., is used extensively to issue grand jury subpoenas prior to indictment, primarily to acquire documentary information.

clerk *shall* issue a subpoena.¹⁴⁶ As case law has equated the trial counsel with a district court clerk in terms of subpoena authority, it seems reasonable for a trial counsel to have the same authority as a district court clerk, after the preferral of charges.¹⁴⁷ An amendment also has a strong statutory foundation in Articles 36 and 46, UCMJ. Article 36 “requires the President, when prescribing regulations, to apply the principles of law and the rules of evidence generally recognized in criminal trials in U.S. district courts, which are not contrary or inconsistent with the UCMJ.”¹⁴⁸ Article 46 states that “[p]rocess issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence *shall be similar* to that which courts of the United States having criminal jurisdiction may lawfully issue.”¹⁴⁹ Therefore, any change to RCM 703(e)(2)(C) would rely on principles of law generally recognized by and based on similar practices used by Article III courts. Based on Congress’s predisposition to leave the mechanical details as to the issuance of process to regulation, it would likely be indifferent to an amendment and defer to the President’s judgment.¹⁵⁰ Military practitioners want and need this amendment.

Some may oppose this change, especially if they believe that legislative change is necessary. Opponents may argue that the language of Article 46 implicitly requires the formal existence of a “court-martial” before trial counsel may issue subpoenas.¹⁵¹ If so, Congress would need to eliminate or modify the language in Article 46. Legislative action would certainly provide a stronger foundation for amendments to RCM 703(e)(2)(C), but its absence would hardly be a reason to avoid amending the rule. More troubling is the view that the combi-

nation of preferral and referral is the federal equivalent of an indictment or an information.¹⁵²

Amend RCM 405(g)

While not mentioned in the final IG report, some JAGC survey participants provided comments regarding Article 32 investigations. Most of these comments revealed frustration over an inability to acquire necessary evidence without a subpoena.¹⁵³ These responses may favor a proposal to amend RCM 405(g)(2) and recommend the authority that trial counsel sought in *Flowers*. The current language of RCM 405(g)(2)(B) states that: “[t]he investigating officer shall decide whether a civilian witness is reasonably available to appear as a witness.”¹⁵⁴ An amendment to the rule might state that “[t]he presence of witnesses not on active duty may be obtained by subpoena.”¹⁵⁵ Currently, RCM 405(g)(2)(C) states:

Evidence. The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer shall inform the parties. Otherwise, the custodian of the evidence shall be requested to provide evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under RCM 906(b)(3).¹⁵⁶

145. Colonel William F. Condron, Jr. & Major Michelle Crawford, Information Paper, *The Manual for Courts-Martial (MCM) Changing the Rules* (5 Feb. 2003) [hereinafter Information Paper] (on file with author) (explaining how to change the UCMJ). Article 36 of the UCMJ gives the President authority to prescribe pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under the UCMJ triable in courts-martial. Thus, the President has authority to change the Rules for Court Martial and the Military Rules of Evidence by executive order. *Id.*; see UCMJ art. 136 (2002).

146. FED. R. CRIM. P. 17; E-mail from Robert Don Gifford, Assistant U.S. Attorney, District of Nev. (Feb. 24, 2003) (on file with author). Mr. Gifford noted that short of its use in a grand jury, Rule 17 does not require document disclosure before trial, but rather requires disclosure only on the day of trial. The court can order documents disclosed only upon motion. *Id.*

147. This proposal also eliminates the disparity between trial counsel’s post preferral and post referral subpoena authority.

148. Information Paper, *supra* note 145.

149. UCMJ art. 46 (emphasis added).

150. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a House Subcomm. of the Comm. on Armed Services*, 81st Cong. 1057 (1949) (commentary); H.R. REP. NO. 491, at 25 (1949); S. REP. NO. 486, at 21 (1949).

151. UCMJ art. 46. “Process issued in court-martial case to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue.” *Id.*

152. See ABA ANALYSIS, *supra* note 67, at 15.

153. CIPO STUDY, *supra* note 1.

154. MCM, *supra* note 2, R.C.M. 405(g)(2)(B).

155. E-mail from Captain Daryl B. Witherspoon, Attorney, Litigation Division (General Litigation Branch), U.S. Army Legal Services Agency (Feb. 3, 2003) (drafting proposal) (on file with author).

A more effective provision might read as follows: “[E]vidence. The presence of evidence not within military control may be obtained by subpoena.”¹⁵⁷

The President should consider implementing a new RCM 405(g)(2)(E). This rule could state as follows:

Who May Issue a subpoena. The special court-martial or the trial counsel may issue a subpoena after prefferal of charges to secure witnesses or evidence for a court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively. The subpoena shall be issued using procedures set forth in RCM 703(e)(2)(D), (F), and (G).¹⁵⁸

Although “[v]arious authorities have equated the Article 32 investigation to the investigation of charges accomplished in civilian life by a grand jury,”¹⁵⁹ there are major differences between them. In a grand jury, as already noted, the prosecution may issue subpoenas.¹⁶⁰ This is not true in Article 32 investigations.¹⁶¹ These proposals for modification of RCM 703 would provide subpoena authority similar to the authority grand juries currently possess. This change would end the conflict over pre-referral subpoena authority. These proposals also have a statutory foundation in Article 36, because they are based on the principles of law generally recognized in criminal trials in U.S. district courts, and are consistent with the UCMJ. Adopting these amendments would also place Article 32 investigating officers in a better position to collect information to help them make critical decisions.

Unfortunately, these proposals will presumably require an amendment to Article 32, UCMJ, a corresponding change to RCM 703, and possibly an amendment to Article 46, UCMJ.

156. MCM, *supra* note 2, R.C.M. 405(g)(2)(C).

157. Witherspoon, *supra* note 155.

158. *Id.*

159. Lieutenant Colonel William A. Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1 (1961) (citing ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMY FORCES OF THE UNITED STATES* 169 (1956)).

160. *See* FED. R. CRIM. P. 17.

161. *See* MCM, *supra* note 2, R.C.M. 703(e)(2)(B).

162. UCMJ art. 32 (2002).

163. CIPO STUDY, *supra* note 1, at 9. Over 200 of the JAGC survey respondents supported this opinion. *Id.*

164. *Id.*; *see* MCM, *supra* note 2, R.C.M. 305(i). Instead of addressing the review of pre-trial confinement, as with RCM 305(i), an amended RCM 703 would contain language describing the responsibilities of a neutral and detached officer appointed in accordance with regulations by the secretary concerned. It would also describe the standards necessary for that officer’s use of subpoena authority after the prefferal of charges.

165. *See* U.S. DEP’T OF ARMY, REG. 27-10, *MILITARY JUSTICE* ch. 9 (6 Sept. 2002).

For example, the first sentence of Article 32 states that an investigation is required before referral to a general court-martial.¹⁶² This language implies that the parties to the investigation have no subpoena authority under the current understanding of RCM 703 and Article 46. Article 32 also lacks implicit or explicit language authorizing the investigating officer or trial counsel to issue subpoenas. As a result, there is a subpoena authority vacuum in Article 32. This vacuum must be filled before the consideration of any applicable rules for court-martial.

Expand or Establish a Military Magistrate Program

Another third of JAGC participants in the CIPO Study responded that if the UCMJ adopts a new investigative subpoena authority, military magistrates should issue or should be permitted to approve subpoenas.¹⁶³ Their response suggests the need for a change to RCM 703, incorporating language similar to that in RCM 305(i).¹⁶⁴ Some may contend that RCM 702 would serve as a foundation for military magistrates to issue subpoenas. An amendment to the rule’s language would give military magistrates subpoena authority beyond that of deposition officers.

This proposal’s most positive aspect is its assurance of oversight by a neutral and detached military magistrate between a case’s prefferal and referral phases. In the Army, there is currently an active, part-time military magistrate program that is supervised by individual military judges.¹⁶⁵ These military judges could continue to supervise the military magistrate program participants and mentor them in the handling of subpoena authorizations. Trial counsel, defense counsel, Article 32 investigating officers, and even law enforcement officers could go to a military magistrate to request a subpoena. The proposal would allow each service the flexibility to establish its own rules and procedures, while also leaving open the option of not adopting a military magistrate program at all. For example, the Army could modify its regulations to reflect the additional sub-

poena authority for a military magistrate, while other services could decide whether to initiate similar programs.

This proposal's most negative aspect is that it may require legislative change to Article 46 to create explicit language allowing for a military magistrate or military judge to issue a subpoena.¹⁶⁶ Military attorneys will have to determine how to best modify the RCM to reflect the subpoena authority of a military magistrate. Amending an Army regulation will take time, and it will take even longer to initiate regulations or procedures for those services without an existing military magistrate program.

Delegation of Administrative Subpoena Authority

The CIPO study revealed that a majority of the JAGC respondents were unfamiliar with the DOD IG subpoena.¹⁶⁷ Their unfamiliarity, however, does not discount the value of proposals to amend the administrative subpoena process. For instance, the "Inspector General Act of 1978 authorizes the Inspector General to require by subpoena [sic] the production of all information . . . necessary in the performance of functions assigned by this Act . . . [N]o provision in the Act . . . states that this subpoena authority may be delegated outside the Office of the Inspector General or used for purposes outside the scope of the Act."¹⁶⁸ Congress should consider amending the Inspector General Act of 1978 to permit delegation of the subpoena authority.

This further delegation of subpoena authority has advantages. It would foster efficiency because the authority would be used a level closer to an investigation. The delegation could go down as far as the installation IG, who would have a more practical, firsthand perspective on the case in question. Finally, the delegation would not abrogate the standards of the inspector IG's system.¹⁶⁹

The disadvantages of this proposal outweigh the advantages, however. First, acquiring such delegation through legislative amendment may be difficult if Congress is unwilling to do for one agency what it will not do for others. Second, any dele-

gated subpoena authority would still be limited to the parameters of the act—fraud, waste, and abuse, but not general crimes.¹⁷⁰ Finally, the IG's office would likely have a difficult time monitoring the process if it was spread out around the world. While such a proposal would make the process easier and more accessible to subordinate organizations, it would certainly not change the inherent limitations of the DOD IG subpoena.

The Status Quo

While the CIPO study brought attention to the inadequacy of "subpoena authority within [the] DOD in support of general crimes investigations for offenses punishable under the UCMJ,"¹⁷¹ there is no guarantee that the JCS will make any recommendations for legislative changes or modifications to the current RCM. There is also no guarantee that either Congress (by legislation) or the President (by executive order) will enact the JCS's recommendations.

In the absence of change, military practitioners could take innovative approaches to pending cases. Military practitioners should encourage and foster "effective working relationships with the DOJ in the investigation and prosecution of crimes involving the programs, operations, or personnel of the Department of Defense."¹⁷² Investigators should seize every opportunity to conduct joint investigations and to share information. This can be especially useful during investigations where MCIO agents and federal law enforcement agents can cross jurisdictional boundaries and assist each other by distributing responsibilities and sharing logistical resources. Opportunities for military prosecutors are also available through the special assistant U.S. attorney (SAUSA) program.¹⁷³ As SAUSAs, military prosecutors can pursue cases that the Department of Justice (DOJ) might not have pursued and which are critical to the Army's needs. These opportunities can establish meaningful working relationships between the DOD and DOJ, and could potentially even give military practitioners access to federal subpoena authority.

166. See UCMJ art. 46.

167. CIPO STUDY, *supra* note 1 (outlining JAGC survey results, Question 25).

168. *Id.* at 9.

169. *But see* Lieutenant Colonel Craig Meredith, *The Inspector General System*, ARMY LAW., Jul./Aug. 2003, at 20.

170. Any consideration of amending the Inspector General's Act to allow subpoena authority for general crime investigations is highly unlikely, considering the Act's main purpose to prevent and detect fraud, waste, and abuse.

171. CIPO STUDY, *supra* note 1, at 5.

172. U.S. DEP'T OF DEFENSE, DIR. 5526.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES 2 (22 Jan. 1985).

173. *Id.* para. C.3.E.1, encl. 1.

This is not a full solution to the problem, however. A civilian jurisdiction's subpoena authority will not always run parallel with military procedure. The *Byard* case exemplifies this point.¹⁷⁴ Military practitioners, especially attorneys, should coordinate with the MCIO legal staffs. These staffs are often divided into regions to better support practitioners in the field.¹⁷⁵

Under the U.S. Army CID, each of its regions has a Group Judge Advocate (GJA) who is responsible for providing advice and assistance to CID commanders and agents within that subordinate command. These GJAs and their service counterparts can be as proactive as necessary to support their agents and the military attorneys who work with them at the unit level, through training, education, and administrative support. For example, they can provide assistance in preparing DOD IG subpoena requests and coordinating their approval through the IG's office. They can also be great resources on issues ranging from internal MCIO procedures to avoiding potential pitfalls under the RFPA. Most importantly, they can be important liaisons between MCIO investigators, military attorneys, and their counterparts in the federal and state judicial systems. It is incumbent upon the GJAs to ensure that trial counsels and investigators know they are available to help when needed.¹⁷⁶

Finally, practitioners need to understand the limitations of the available subpoena authority and be aware of the legal alternatives. From an examination of all the CIPO Survey responses, it is apparent that investigators and attorneys alike frequently used or attempted to use substitute mechanisms to acquire much-needed evidence.¹⁷⁷ Unfortunately, under the current procedures, sometimes no recourse is available.

Conclusion

From its start in England to its birth in the American colonial government, and then in the military, subpoena authority was either non-existent or little-used. Over time, the needs of the

evolving judicial system and its success in limited forums such as the English Chancery fostered expansion of subpoena powers through statutes and rules. Today, the views of military practitioners and the CIPO Study reflect the need to expand subpoena authority in the military.

The interval between prefferal and referral, when no adequate or useful mechanism is available to enforce the production of evidence and witnesses, often leaves practitioners frustrated and in search of ways to acquire evidence. This is a critical period of time, when investigating officers and trial counsel need access to evidence and information in order to decide whether preferred charges have merit. If relevant information is unavailable, then justice cannot be served and the accused must go through a potentially unnecessary and arduous process.

Practitioners have pursued various methods to acquire the evidence needed to investigate and develop a case before referral. Some approaches, as demonstrated by *Byard* and *Flowers*, resulted in negative, costly consequences. An appraisal of other approaches is limited to the recorded, voluntary statements that participants made in the CIPO evaluation. Based on these sources, there is no doubt that there is a need for change—this is the time to consider amending the RCM, the UCMJ or both.

While there are advantages and disadvantages to each proposal to expand subpoena authority, modification of RCM 703 (e)(2)(C) appears to be the most viable. It is not certain whether such a change would require Congress to modify Article 46, UCMJ. Modification to RCM 405(g)(2) is viable both separately and in addition to the RCM 703(e)(2)(C) change. This would make appropriate legislative modification to Article 32, UCMJ necessary, however. Other proposals have merit, but lack the breadth of the first two proposals. Other proposals may also meet resistance from the various services and from the DOD IG, because they would require considerable regulatory guidance and supervision to ensure quality and consistency.

174. See *United States v. Byard*, 29 M.J. 803, 805 (A.C.M.R. 1989).

175. For instance, the USACIDC is composed of:

a command headquarters, forensic laboratories, the U.S. Army Crime Records Center, the U.S. Army Protective Services Activity, and worldwide field investigative units.

In non-tactical situations, each USACIDC unit is normally a tenant activity at an Army installation, providing investigative support to the installation commander as well as to the commanders of all other Army elements located within a USACIDC specified geographic area of responsibility. The commander or special agents in-charge at each unit provides advice and guidance on all CID matters to supported commanders and provost marshals or security officers.

U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para.2-1 (30 Oct. 1985); see U.S. Army Criminal Investigation Command, CID Public Affairs, CID Units (29 Jul. 2003), at <http://www.cid.army.mil/>.

176. It appears that practitioners may not realize that GJAs or their service counterparts exist, or may not use their assistance.

177. CIPO STUDY, *supra* note 1. Survey responses indicate that investigators used many other mechanisms to acquire evidence, such as command-authorized searches based on probable cause, search warrants, written requests such as those under the RFPA, and federal court orders. Interestingly, the majority of investigators found that consent searches were the most effective tool used to gather evidence. *Id.*

Maintaining the status quo is another option, but the common law courts of sixteenth century England have already demonstrated the status quo is not always the most efficient and thorough approach to justice. Just as in the sixteenth century, when “it was becoming obvious that juries could not decide the

questions at issue from their own knowledge,”¹⁷⁸ it is now obvious that the military legal system needs—and its practitioners want—more expansive subpoena authority to pursue the crimes of a modern and technologically complicated world.

178. HOLDSWORTH, *supra* note 23, at 131.

Note from the Field

Voir dire: It's Not Just What's Asked, But Who's Asking and How¹

David Court
Civilian Defense Counsel

Voir dire is the first opportunity counsel may have to address the individuals who decide the fate of their clients. Counsel, however, have no right to conduct their own voir dire: "The military judge *may* permit the parties to conduct the examination of members or *may* personally conduct the examination."² The purpose of this note is to convince military judges to permit counsel-conducted voir dire, both general and individual, and to encourage all advocates, whether prosecution or defense, to use this opportunity. This note does not justify the process of voir dire—its place in the courts-martial practice seems beyond question. "[F]ew experienced trial advocates would doubt the importance of *voir dire*."³

Voir dire has several judicially recognized purposes: (1) to ensure impartiality; (2) to educate the panel about the facts and the law in the case; (3) to develop rapport with the members; and (4) to determine how to exercise challenges, both causal and peremptory.⁴ Either the military judge or counsel may address these purposes. Advocates must be intimately familiar with the facts of their cases to address some of these recognized purposes, but only a courageous (and foolish) counsel would attempt to "indoctrinate"⁵ a panel on the law, as that is clearly the military judge's function.⁶

The *Military Judges' Benchbook (Benchbook)*, DA Pamphlet 27-9, lists twenty-eight questions that the military judge may use in voir dire.⁷ Nine of these twenty-eight questions (two of which are potential follow-up questions) address the issue of impartiality, five in the context of sentencing; nine (two of which are potential follow-up questions) are related to the members' backgrounds and life experiences, which also relate to impartiality.⁸ The final six questions teach the members about the law. Four of these concern reasonable doubt; and one question each concerns the burden of proof and credibility of witnesses.⁹ None of these twenty-eight generic questions are designed to educate a panel about the facts of a case, nor are they designed to develop rapport with the members.¹⁰ When the military judge asks these questions, it would be inappropriate for him to attempt to develop a rapport with the members because he later must instruct them to "disregard any comment or statement or expression made by [the military judge] during the course of the trial that might seem to indicate any opinion on [the military judge's] part."¹¹

An advocate who asks focused questions can center the panel's attention much more effectively than the *Benchbook's* voir dire questions. Thus, there is a role for counsel-conducted general voir dire. Some military judges, however, may believe the following: (1) counsel-conducted voir dire wastes time;¹² (2) counsel do not know how to conduct voir dire well, or do not know how to develop causal challenges;¹³ (3) counsel embarrass themselves or panel members with thoughtless or inartfully worded questions;¹⁴ and (4) because most federal

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1. This article reflects the substance of the author's comments at the 2003 Interservice Military Judges' Seminar, Maxwell Air Force Base, Alabama (Apr. 22, 2003).
 2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(d) (2002) [hereinafter MCM] (emphasis added).
 3. United States v. Holt, 33 M.J. 400, 411 (C.M.A. 1991).
 4. United States v. Jefferson, 44 M.J. 312, 318 (1996).
 5. *Id.*
 6. See U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK ch. 2, § V, para. 2-5 (15 Sept. 2002) [hereinafter BENCHBOOK].
 7. *Id.* para. 2-5-1.
 8. *Id.*
 9. *Id.*
 10. See *id.*
 11. *Id.* para. 2-5-12.
 12. See United States v. Jefferson, 44 M.J. 312, 318 (1996).
 13. See United States v. Holt, 33 M.J. 400, 411 (C.M.A. 1991).
 14. Cf. Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. REV. 423 (1985) (concluding that it is better for judges to conduct their own voir dire; based on an experiment in the U.S. Court of Appeals for the Second Circuit).

(Article III) courts do not allow counsel-conducted voir dire,¹⁵ military judges should not either.

First, requiring counsel to submit written voir dire questions to military judges before trial enables counsel to revise improperly worded questions and helps eliminate the perception that voir dire may waste time. The military judge, at either a Rule for Courts-Martial (RCM) 802 or Article 39a session, can review the questions to determine their validity.¹⁶ Military courts have expressly approved this procedure,¹⁷ with the caveat that “the denial [at trial] of otherwise proper questions only because they had not been previously proffered is unduly restrictive and an abuse of discretion.”¹⁸ Second, this procedure also allows the military judge to mentor an eager counsel whose questions are inappropriate, saving the counsel and the panel embarrassment at trial. Since much personal and professional information about the panel members should be available through member questionnaires before voir dire,¹⁹ counsel should limit background questions to case-specific information. Generally, military judges will not have previous knowledge of any case-specific facts. Therefore, the advocates may be best suited to articulate information to the military judge why a question is necessary, or explain it to the panel if they misunderstand the question.

Third, by mentoring counsel to conduct effective voir dire, military judges improve the system. If experienced military judges exercise the discretion to deny young counsel adequate voir dire opportunities because counsel do not conduct it well, how will young advocates ever learn to become experienced trial advocates, such as the one praised in *United States v. Holt*?²⁰ While RCM 912(f)(1)(A)-(N) clearly lists some of the

common bases for challenges for cause, subparagraph (N) is broad enough to allow relevant inquiries beyond the generic questions in the *Benchbook*.²¹ Consequently, counsel should be able to articulate the relevance of their proposed questions at RCM 802 or Article 39a sessions. If practice makes perfect, then providing young counsel with voir dire opportunities is one good way to cure imperfection.

Finally, the Article III or federal court argument disregards the unique nature and genesis of courts-martial. The panel-selecting convening authority has no parallel in Article III courts.²² Both advocates and jurists have referred to the military panel as a “blue ribbon panel.”²³ The convening authority, however, has already screened the panel based upon criteria that include “education, training, experience, . . . and judicial temperament.”²⁴ Perhaps in recognition of this pre-screening for qualified members, trial and defense counsel are each only entitled to one peremptory challenge.²⁵ These differences significantly weaken any attempt to integrate Article III voir dire practice into military courts-martial. Moreover, the argument that courts-martial should reflect Article III courts ignores the very real concern that the public perception of the court-martial process is crucial to its continued acceptance, and even its very existence.²⁶

What, then, are reasons for permitting counsel-conducted general voir dire? In *United States v. Jefferson*, the court cites building rapport with the panel as one important reason.²⁷ Each counsel is presenting evidence and proposing an analysis of that evidence to either prove or discredit an allegation. Each advocate’s credibility may be as important to the panel members’ decision-making process as the facts themselves. It is often

15. *See id.*

16. *See* MCM, *supra* note 2, R.C.M. 802-803.

17. *See* *United States v. Dewrell*, 55 M.J. 131 (2001); *United States v. Torres*, 25 M.J. 555 (A.C.M.R. 1987), *pet. denied*, 27 M.J. 466 (C.M.A. 1988); *United States v. Slubowski*, 7 M.J. 461 (C.M.A. 1979), *pet. denied*, 9 M.J. 264 (C.M.A. 1980).

18. *Torres*, 25 M.J. at 557.

19. *See* MCM, *supra* note 2, R.C.M. 912(a)(1).

20. 33 M.J. 400, 411 (C.M.A. 1991) (emphasizing “the importance of . . . voir dire in uncovering possible latent blind spots and in preparing the members” for the case).

21. MCM, *supra* note 2, R.C.M. 912(f)(1)(A)-(N) (noting that a member who is not free of bias “should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality”).

22. UCMJ art. 25 (2002); MCM, *supra* note 2, R.C.M. 502(a)(1).

23. *United States v. Wiesen*, 56 M.J. 172, 180 (2001) (Crawford, C.J., dissenting); *United States v. Rome*, 47 M.J. 467, 471 (1998) (Crawford, J., dissenting); *United States v. Youngblood*, 47 M.J. 338, 346 (1997) (Crawford, J., dissenting).

24. UCMJ art. 25(d)(2).

25. MCM, *supra* note 2, R.C.M. 912(g).

26. *See, e.g.*, *United States v. Dinatale*, 44 M.J. 325 (1996).

27. *United States v. Jefferson*, 44 M.J. 312, 318 (1996).

said that it is not what one says but how one says it that counts. There is, of course, a fine line between establishing a professional rapport with panel members and attempting to use the power of personality to verbally seduce or hypnotize them. This fear, however, is more likely to occur in an Article III court than in a court-martial, given the “blue ribbon” nature of the panel.²⁸

Another reason to permit voir dire is that it assists counsel in determining whether members are impartial. Equally as important as the answers are the responding members’ body language, visible comfort with the questions, and their apparent degree of candor. Peremptory challenges are necessarily based on such subtle cues, consistent with *Jefferson’s* observation that voir dire “is also used by counsel as a means of . . . determining how to exercise peremptory challenges.”²⁹

Next, educating panel members about a case is another reason justifying the use of counsel-conducted voir dire in courts-martial. Only an advocate can know what facts to use to educate or question the panel. For example, the military judge will not know if alcohol plays a role in a case unless it is part of the charged offense. On the other hand, a knowledgeable counsel will know enough to question whether panel members abstain from using alcohol, or view its use as a moral issue. Although the military judge will ask a generic question about panel members and alcohol consumption if a counsel requests it, only counsel will know how far to go to “uncover . . . possible latent blind spots.”³⁰ Failure to provide for any follow-up questions during general voir dire, requiring the counsel to wait for individual voir dire instead, could well be a waste of time.

There are also areas appropriate for general voir dire questioning, independent of evidentiary considerations, which

should only come from an advocate. For example, in a case of beating a child with an electrical cord, a defense counsel might display the weapon to the panel to see if there are any noticeable reactions.³¹ In a case with an immunized witness, a prosecutor might explore the panel members’ reactions to the use of informants. In another case, the defense counsel might ask about the theory of alibi to learn if panel members have a visceral dislike for the word. The prosecution may wish to learn if panel members can grasp the concepts of principal or co-conspirator as they apply to the case.

Finally, public perception of the military justice system is logically connected to counsel-conducted voir dire from colonial times. As Judge Crawford observed in *Jefferson*, a reason for voir dire was that “[d]uring British rule, the Americans were concerned that in trials of political opponents the Crown may attempt to stack the jury in its favor.”³² What impression will the current American public have if the counsel for an accused who is ordered to trial by the same commander who also selects the panel, is prohibited from even questioning those members to determine their fitness to sit in judgment?

It is clearly within the military judge’s discretion to permit or deny counsel-conducted general voir dire because neither the trial nor the defense counsel has a statutory right to conduct it. It seems unfair, at the very least, absent a sound, rational, and articulable basis, to deny counsel this trial tool. If military courts-martial are to continue as fair fora to adjudicate the culpability of American service members, perhaps there should be more acknowledgment of the observation that former Supreme Court Justice Potter Stewart made: “Fairness is what justice really is.”³³

28. See *Wiesen*, 56 M.J. at 180; *Rome*, 47 M.J. at 471; *Youngblood*, 47 M.J. at 346.

29. *Id.*

30. *United States v. Holt*, 33 M.J. 400, 411 (C.M.A. 1991).

31. *Id.*

32. *Jefferson*, 44 M.J. at 317.

33. DAVID SHRAGER & ELIZABETH FROST, *THE QUOTABLE LAWYER* 158 (1986) (quoting U.S. Supreme Court Justice Potter Stewart).

LCS Practice Note

Major James Dorn, The Judge Advocate General's Legal Center & School, U.S. Army

Construction Funding

So How Are We Supposed to Pay For This? The Frustrating and Yet Unresolved Saga of Combat and Contingency-Related, O&M Funded Construction

Usually, when Congress gives the Department of Defense (DOD) money in the middle of a fiscal year, it's a good thing. Unfortunately for the DOD, Congress buried a little land mine in the 2003 Emergency Wartime Supplemental Appropriations Act (EWSAA)¹ that has created much consternation among those seeking legal authority to spend Operations and Maintenance (O&M) funds for construction projects in support of combat and contingency missions.

To understand the DOD's position, it helps to start from the beginning. Under 10 U.S.C. § 2805, the Secretary of a military department may use O&M funds to finance unspecified minor military construction projects only if the complete project costs \$750,000 or less; that limit rises to \$1.5 million if the project is intended solely to "correct a deficiency that threatens life, health, or safety."² Unfortunately, even a modest base-camp in a deployed environment often costs more than \$750,000.

On 22 February 2000, in the wake of events unfolding in Kosovo, the Army Deputy General Counsel (Ethics and Fiscal) issued a policy memorandum stating that the Army should use O&M funds to build structures during combat and contingency operations if the structures "are clearly intended to meet a temporary operational requirement to facilitate combat or contin-

gency operations."³ To qualify for this "combat or contingency exception," a project must have clearly been intended to meet a temporary operational requirement; be intended to facilitate combat or contingency operations; and not designed to satisfy requirements for permanent use at the conclusion of combat or contingency operations (i.e., follow-on operations, future exercises, permanent host nation use, etc.).⁴

For three years, the Army used this doctrine as legal authority to fund contingency and combat-related construction projects costing in excess of the \$750,000 O&M funding cap.⁵ Then, on 27 February 2003, the Under Secretary of Defense (Comptroller) issued a policy memorandum clarifying the DOD's position on the use of O&M funds for construction in support of combat and contingency missions.⁶ The memorandum authorized the use of O&M funds for such construction where the construction was necessary to meet an urgent but temporary military operational requirement; the construction would not be carried out on a "military installation" as defined under 10 U.S.C. § 2801;⁷ and the United States had no intention to use the construction after the operational requirement has been satisfied.⁸

Unfortunately for those wishing to use the DOD Under Secretary's memo as legal authority to fund such projects, Congress quickly acted to reverse the policy by passing the EWSAA. On 16 April 2003, the President signed the legislation.⁹ Section 1901 of the EWSAA authorized the Secretary of Defense to transfer up to \$150 million of funds appropriated in the supplemental appropriation to carry out military construc-

1. Emergency Wartime Supplemental Appropriations for Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003) [hereinafter EWSAA].

2. 10 U.S.C.S. § 2805(c)(1) (LEXIS 2003).

3. Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, U.S. Dep't of Army, to Assistant Secretary (Financial Management & Comptroller), subject: Construction of Contingency Facility Requirements (22 Feb. 2000) (on file with author).

4. *Id.*

5. About six months after the Army Deputy General Counsel issued this policy memorandum, the General Accounting Office (GAO) issued a report focusing on costs associated with the Balkans Support Contract. Although the report criticized the Army's efforts to reduce costs under the contract, the report failed to raise any objections to the Army's decision to spend O&M funds for construction projects that clearly exceeded the \$750,000 O&M funding threshold. See GEN. ACCT. OFF., REP. NO. GAO-00-225, *Contingency Operations: Army Should Do More to Control Contract Costs in the Balkans*, (Sept. 29, 2000) [hereinafter GAO-00-225].

6. See Memorandum, Under Secretary of Defense (Comptroller), subject: Availability of Operation and Maintenance Appropriations for Construction (27 Feb. 2003) [hereinafter Under Secretary Defense Memo] (on file with author).

7. 10 U.S.C.S. § 2801(b)(2). Under this statute:

the term "military installation" means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense.

Id.

8. See Under Secretary Defense Memo, *supra* note 6.

tion projects not otherwise authorized by law.¹⁰ Such funds would then be available to the DOD pursuant to the Secretary's authority to carry out contingency construction projects under 10 U.S.C. § 2804,¹¹ which requires twenty-one day advance notice to Congress. Additionally, section 1901 of the EWSAA further restricted the definition of "military installation" under 10 U.S.C. § 2801 to exclude projects that would previously have been permitted pursuant to the Under Secretary's memorandum.¹² Congress explained that a "military installation" now includes:

not only buildings, structures and other improvements to real property under the operational control [of the United States] . . . but also, any building, structure or real property improvement to be used by the Armed Forces, regardless of whether such use is anticipated to be temporary or of longer duration.¹³

To clarify Congress' intent, the conference report accompanying the supplemental appropriation clearly rejected the policy articulated in the Under Secretary's memorandum, and insisted that the Secretary of Defense use his authority under 10 U.S.C. § 2804 to carry out contingency related construction in the future.¹⁴

The EWSAA's impact upon the DOD is uncertain. Unfortunately for the DOD, the contingency construction authority provided under 10 U.S.C. § 2804 requires the Secretary of Defense to submit a written report to "the appropriate committees of Congress" on any decision to use this authority.¹⁵ Each report requires "the justification for the project and the current estimate of the cost of the project, and the justification for carrying out the project under this section."¹⁶ The project may then be carried out only after the end of the twenty-one day period "beginning on the date the notification is received by such committees."¹⁷ Arguably, this authority is too cumbersome and inflexible to accommodate the DOD's changing requirements in a contingency or combat environment.

9. EWSAA, *supra* note 1.

10. *Id.* § 1901.

11. 10 U.S.C.S. § 2804. The statute provides:

(a) Within the amount appropriated for such purpose, the Secretary of Defense may carry out a military construction project not otherwise authorized by law, or may authorize the Secretary of a military department to carry out such a project, if the Secretary of Defense determines that deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security or national interest.

(b) When a decision is made to carry out a military construction project under this section, the Secretary of Defense shall submit a report in writing to the appropriate committees of Congress on that decision. Each such report shall include (1) the justification for the project and the current estimate of the cost of the project, and (2) the justification for carrying out the project under this section. The project may then be carried out only after the end of the 21-day period beginning on the date the notification is received by such committees.

Id.

12. EWSAA, *supra* note 1, § 1901.

13. *Id.*

14. *Id.*

15. 10 U.S.C.S. § 2804.

16. *Id.*

17. *Id.*

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, U.S. Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, dial 1, extension 3304.

When requesting a reservation, you should know the following:

TJAGSA Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule (August 2003 - September 2005)

Course Title	Dates	ATRRS No.
GENERAL		
52d Graduate Course	18 August 03 - 27 May 04	(5-27-C22)
53d Graduate Course	16 August 04 - 26 May 05	(5-27-C22)
54th Graduate Course	15 August 05 - thru TBD	(5-27-C22)
162d Basic Course	16 September - 10 October 03 (Phase I - Ft. Lee) 17 October - 18 December 03 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
163d Basic Course	6 - 30 January 04 (Phase I - Ft. Lee) 29 January - 9 April 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
164th Basic Course	1 - 24 June 04 (Phase I - Ft. Lee) 25 June - 3 September 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
165th Basic Course	14 September - 1 October 04 (Phase I - Ft. Lee) 12 October - 16 December 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
166th Basic Course	4 - 28 January 05 (Phase I - Ft. Lee) 31 January - 8 April 05 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)

167th Basic Course	31 May - June 05 (Phase I - Ft. Lee) 25 June - 1 September 05 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
168th Basic Course	13 September - thru TBD (Phase I- Ft. Lee) TBD (Phase II – TJAGSA)	(5-27-C20)
8th Speech Recognition Training	1– 12 December 03	(512-27DC4)
9th Speech Recognition Training	25 October - 5 November 04	(512-27DC4)
12th Court Reporter Course	25 August - 28 October 03	(512-27DC5)
13th Court Reporter Course	26 January - 26 March 04	(512-27DC5)
14th Court Reporter Course	26 April - 25 June 04	(512-27DC5)
15th Court Reporter Course	2 August - 1 October 04	(512-27DC5)
16th Court Reporter Course	24 January - 25 March 05	(512-27DC5)
17th Court Reporter Course	25 April - 24 June 05	(512-27DC5)
18th Court Reporter Course	1 August - 5 October 05	(512-27DC5)
3d Court Reporting Symposium	17 - 21 November 03	(512-27DC6)
4th Court Reporting Symposium	15 -19 November 04	(512-27DC6)
178th Senior Officers Legal Orientation Course	8 - 12 September 03	(5F-F1)
179th Senior Officers Legal Orientation Course	17 - 21 November 03	(5F-F1)
180th Senior Officers Legal Orientation Course	26 - 30 January 04	(5F-F1)
181st Senior Officers Legal Orientation Course	22 - 26 March 04	(5F-F1)
182d Senior Officers Legal Orientation Course	17 - 21 May 04	(5F-F1)
183d Senior Officers Legal Orientation Course	13 - 16 September 04	(5F-F1)
184d Senior Officers Legal Orientation Course	15 - 19 November 04	(5F-F1)
185d Senior Officers Legal Orientation Course	24 - 28 January 05	(5F-F1)
186d Senior Officers Legal Orientation Course	28 March - 1 April 05	(5F-F1)

187d Senior Officers Legal Orientation Course	13 - 17 June 05	(5F-F1)
188th Senior Officers Legal Orientation Course	12 - 16 September 05	(5F-F1)
10th RC General Officers Legal Orientation Course	21- 23 January 04	(5F-F3)
11th RC General Officers Legal Orientation Course	19 - 21 January 05	(5F-F3)
34th Staff Judge Advocate Course	7 - 11 June 04	(5F-F52)
35th Staff Judge Advocate Course	6 - 10 June 05	(5F-F52)
7th Staff Judge Advocate Team Leadership Course	7 - 9 June 04	(5F-F52-S)
8th Staff Judge Advocate Team Leadership Course	6 - 8 June 05	(5F-F52-S)
2004 Reserve Component Judge Advocate Workshop	19 - 22 April 04	(5F-F56)
2005 Reserve Component Judge Advocate Workshop	11 - 14 April 05	(5F-F56)
2004 JAOAC (Phase II)	4 - 16 January 04	(5F-F55)
2005 JAOAC (Phase II)	2 - 14 January 05	(5F-F55)
35th Methods of Instruction Course	19 - 23 July 04	(5F-F70)
36th Methods of Instruction Course	18 - 22 July 05	(5F-F70)
2003 JAG Annual CLE Workshop	6 - 10 October 03	(5F-JAG)
2004 JAG Annual CLE Workshop	4 - 8 October 04	(5F-JAG)
15th Legal Administrators Course	21 - 25 June 04	(7A-550A1)
16th Legal Administrators Course	20 - 24 June 05	(7A-550A1)
15th Law for Paralegal NCOs Course	29 March - 2 April 04	(512-27D/20/30)
16th Law for Paralegal NCOs Course	28 March - 1 April 05	(512-27D/20/30)

15th Senior Paralegal NCO Management Course	14 - 18 June 04	(512-27D/40/50)
16th Senior Paralegal NCO Management Course	13 - 17 June 05	(512-27D/40/50)
8th Chief Paralegal NCO Course	14 - 18 June 04	(512-27D- CLNCO)
9th Chief Paralegal NCO Course	13 - 17 June 05	(512-27D- CLNCO)
5th 27D BNCOC	12 - 29 October 04	
6th 27D BNCOC	3 - 21 January 05	
7th 27D BNCOC	7 - 25 March 05	
8th 27D BNCOC	16 May - 3 June 05	
9th 27D BNCOC	1 - 19 August 05	
4th 27D ANCOG	25 October - 10 November 04	
5th 27D ANCOG	10 - 28 January 05	
6th 27D ANCOG	25 April - 13 May 05	
7th 27D ANCOG	18 July - 5 August 05	
4th JA Warrant Officer Advanced Course	12 July - 6 August 04	(7A-270A2)
11th JA Warrant Officer Basic Course	31 May - 25 June 04	(7A-270A0)
12th JA Warrant Officer Basic Course	31 May - 24 June 05	(7A-270A0)
JA Professional Recruiting Seminar	14 - 16 July 04	(JARC-181)
JA Professional Recruiting Seminar	13 - 15 July 05	(JARC-181)

ADMINISTRATIVE AND CIVIL LAW

2d Advanced Federal Labor Relations Course	22 - 24 October 03	(5F-F21)
3d Advanced Federal Labor Relations Course	20 - 22 October 04	(5F-F21)
57th Federal Labor Relations Course	20 - 24 October 03	(5F-F22)
58th Federal Labor Relations Course	18 - 22 October 04	(5F-F22)

53d Legal Assistance Course	3 - 7 November 03	(5F-F23)
54th Legal Assistance Course	10 - 14 May 04	(5F-F23)
55th Legal Assistance Course	1 - 5 November 04	(5F-F23)
56th Legal Assistance Course	16 - 20 May 05	(5F-F23)
2003 USAREUR Legal Assistance CLE	20 - 24 Oct 03	(5F-F23E))
2004 USAREUR Legal Assistance CLE	18 - 22 Oct 04	(5F-F23E)
28th Admin Law for Military Installations Course	8 - 12 March 04	(5F-F24)
29th Admin Law for Military Installations Course	14 - 18 March 05	(5F-F24)
2003 USAREUR Administrative Law CLE	8 - 12 September 03	(5F-F24E)
2004 USAREUR Administrative Law CLE	13 - 16 September 04	(5F-F24E)
2005 USAREUR Administrative Law CLE	12 - 15 September 05	(5F-F24E)
2003 Federal Income Tax Course (Montgomery, AL)	15 - 19 December 03	(5F-F28)
2004 Federal Income Tax Course (Charlottesville, VA)	29 November - 3 December 04	(5F-F28)
2004 Hawaii Estate Planning Course	20 - 23 January 05	(5F-F27H)
2003 USAREUR Income Tax CLE	8 - 12 December 03	(5F-F28E)
2004 USAREUR Income Tax CLE	13 - 17 December 04	(5F-F28E)
2004 Hawaii Income Tax CLE	12 - 16 January 04	(5F-F28H)
2005 Hawaii Income Tax CLE	11 - 14 January 05	(5F-F28H)
2004 PACOM Income Tax CLE	5 - 9 January 2004	(5F-F28P)
2005 PACOM Income Tax CLE	3 - 7 January 2005	(5F-F28P)
22d Federal Litigation Course	2 - 6 August 04	(5F-F29)
23d Federal Litigation Course	1 - 5 August 05	(5F-F29)

2d Ethics Counselors Course	12 - 16 April 04	(5F-F202)
3d Ethics Counselors Course	18 - 22 April 05	(5F-F202)
CONTRACT AND FISCAL LAW		
152d Contract Attorneys Course	23 February - 5 March 04	(5F-F10)
153d Contract Attorneys Course	26 July - 6 August 04	(5F-F10)
154th Contract Attorneys Course	28 February - 11 March 05	(5F-F10)
155th Contract Attorneys Course	25 July - 5 August 05	(5F-F10)
6th Advanced Contract Law	15 - 19 March 04	(5F-F103)
5th Contract Litigation Course	21 - 25 March 05	(5F-F102)
2003 Government Contract Law Symposium	2 - 5 December 03	(5F-F11)
2004 Government Contract Law Symposium	8 - 11 December 04	(5F-F11)
67th Fiscal Law Course	27 - 31 October 03	(5F-F12)
68th Fiscal Law Course	26 - 30 April 04	(5F-F12)
69th Fiscal Law Course	3 - 7 May 04	(5F-F12)
70th Fiscal Law Course	25 - 29 October 04	(5F-F12)
71st Fiscal Law Course	25 - 29 April 05	(5F-F12)
72d Fiscal Law Course	2 - 6 May 05	(5F-F12)
11th Comptrollers Accreditation Course (Fort Bragg)	20 - 24 October 03	(5F-F14)
12th Comptrollers Accreditation Course (Hawaii)	26 - 30 January 04	(5F-F14)
13th Comptrollers Accreditation Course (Fort Monmouth)	14 - 17 June 04	(5F-F14)
6th Procurement Fraud Course	1 - 3 June 04	(5F-F101)
2004 USAREUR Contract & Fiscal Law CLE	12 - 16 January 04	(5F-F15E)
2005 USAREUR Contract & Fiscal Law CLE	10 - 14 January 05	(5F-F15E)

2004 Maxwell AFB Fiscal Law Course 10 - 13 February 04
2005 Maxwell AFB Fiscal Law Course 7 - 11 February 05

CRIMINAL LAW

10th Military Justice Managers Course 23 - 27 August 04 (5F-F31)
11th Military Justice Managers Course 22 - 26 August 05 (5F-F31)

47th Military Judge Course 26 April - 14 May 04 (5F-F33)
48th Military Judge Course 25 April - 13 May 05 (5F-F33)

20th Criminal Law Advocacy Course 15 - 26 September 03 (5F-F34)
21st Criminal Law Advocacy Course 15 - 26 March 04 (5F-F34)
22d Criminal Law Advocacy Course 13 - 24 September 04 (5F-F34)
23d Criminal Law Advocacy Course 14 - 25 March 05 (5F-F34)
24d Criminal Law Advocacy Course 12 - 23 September 05 (5F-F34)

27th Criminal Law New Developments Course 17 - 20 November 03 (5F-F35)
28th Criminal Law New Developments Course 15 - 19 November 04 (5F-F35)

2004 USAREUR Criminal Law CLE 5 - 9 January 04 (5F-F35E)
2005 USAREUR Criminal Law CLE 3 - 7 January 05 (5F-F35E)

INTERNATIONAL AND OPERATIONAL

3d Domestic Operational Law Course 27 - 31 October 03 (5F-F45)
4d Domestic Operational Law Course 25 - 29 October 04 (5F-F45)

7th Basic Intelligence Law Course (TJAGSA) 28 - 29 June 04 (5F-F41)

7th Advanced Intelligence Law (National Ground Intelligence Center) 30 June - 2 July 2004 (5F-F41)

8th Intelligence Law Course 31 May - 3 June 05 (5F-F41)

81st Law of War Course	2 - 6 February 04	(5F-F42)
82d Law of War Course	12 - 16 July 04	(5F-F42)
83d Law of War Course	31 January - 4 February 05	(5F-F42)
84d Law of War Course	11 - 15 July 05	(5F-F42)
41st Operational Law Course	23 February - 5 March 04	(5 F-F47)
42d Operational Law Course	9 - 20 August 04	(5F-F47)
43d Operational Law Course	28 February - 11 March 05	(5F-F47)
44d Operational Law Course	8 - 19 August 05	(5F-F47)
2004 USAREUR Operational Law CLE	12 - 15 January 2004	(5F-F47E)
2005 USAREUR Operational Law CLE	10 - 14 January 2005	(5F-F47E)

3. Civilian-Sponsored CLE Courses

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education P.O. Box 728 University, MS 38677-0728 (662) 915-1225	ASLM: American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
ABA: American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200	CCEB: Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
AGACL: Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552	CLA: Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600	CLESN: CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
	ESI: Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
	FBA: Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252

FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300	NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664	NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250	PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272	PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080	TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227	TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837	UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100	UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
NCDA:	National College of District Attorneys University of Houston Law Center 4800 Calhoun Street Houston, TX 77204-6380 (713) 747-NCDA	VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905.
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482		

4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2003**, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGSA in the year 2004 ("2004

JAOAC”). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2004 JAOAC will be held in January 2004, and is a prerequisite for most JA captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading by the same deadline (1 November 2003). If the student receives notice of the need to re-do any examination or exercise after 1 October 2003, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be cleared to attend the 2004 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel JT. Parker, telephone (800) 552-3978, ext. 3357, or e-mail JT.Parker@hqda.army.mil.

5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>State</u>	<u>Local Official</u>	<u>CLE Requirements</u>
Alabama**	Director of CLE AL State Bar 415 Dexter Ave. Montgomery, AL 36104 (334) 269-1515 http://www.alabar.org/	-Twelve hours per year. -Military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona	Administrative Assistant State Bar of AZ 111 W. Monroe St. Ste. 1800 Phoenix, AZ 85003-1742 (602) 340-7328 http://www.azbar.org/AttorneyResources/mcle.asp	-Fifteen hours per year, three hours must be in legal ethics. -Reporting date: 15 September.
Arkansas	Secretary Arkansas CLE Board Supreme Court of AR 120 Justice Building 625 Marshall Little Rock, AR 72201 (501) 374-1855 http://courts.state.ar.us/clerkules/htm	-Twelve hours per year, one hour must be in legal ethics. -Reporting date: 30 June.

California*	Director Office of Certification The State Bar of CA 180 Howard Street San Francisco, CA 94102 (415) 538-2133 http://calbar.org	-Twenty-five hours over three years, four hours required in ethics, one hour required in substance abuse and emotional distress, one hour required in elimination of bias. -Reporting date/period: Group 1 (Last Name A-G) 1 Feb 01-31 Jan 04 and every thirty-six months thereafter) Group 2 (Last Name H-M) 1 Feb 00 - 31 Jan 03 and every thirty-six months thereafter) Group 3 (Last Name N-Z) 1 Feb 02 - 31 Jan 05 and every thirty-six months thereafter).
Colorado	Executive Director CO Supreme Court Board of CLE & Judicial Education 600 17th St., Ste., #520S Denver, CO 80202 (303) 893-8094 http://www.courts.state.co.us/cle/cle.htm	-Forty-five hours over three year period, seven hours must be in legal ethics. -Reporting date: Anytime within three-year period.
Delaware	Executive Director Commission on CLE 200 W. 9th St. Ste. 300-B Wilmington, DE 19801 (302) 577-7040 http://courts.state.de.us/cle/rules.htm	-Twenty-four hours over two years including at least four hours in Enhanced Ethics. See website for specific requirements for newly admitted attorneys. -Reporting date: Period ends 31 December.
Florida**	Course Approval Specialist Legal Specialization and Education The FL Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5842 http://www.flabar.org/new-flabar/memberservices/certify/blse600.html	-Thirty hours over a three year period, five hours must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys, and out-of-state attorneys are exempt. -Reporting date: Every three years during month designated by the Bar.
Georgia	GA Commission on Continuing Lawyer Competency 800 The Hurt Bldg. 50 Hurt Plaza Atlanta, GA 30303 (404) 527-8712 http://www.gabar.org/ga_bar/frame7.htm	-Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice. -Out-of-state attorneys exempt. -Reporting date: 31 January.

Idaho	Membership Administrator ID State Bar P.O. Box 895 Boise, ID 83701-0895 (208) 334-4500 http://www.state.id.us/isb/mcle_rules.htm	-Thirty hours over a three year period, two hours must be in legal ethics. -Reporting date: 31 December. Every third year determined by year of admission.	Maine	Administrative Director P.O. Box 527 August, ME 04332-1820 (207) 623-1121 http://www.mainebar.org/cle.html	-Eleven hours per year, at least one hour in the area of professional responsibility is recommended but not required. -Members of the armed forces of the United States on active duty; unless they are practicing law in Maine. -Report date: July.
Indiana	Executive Director IN Commission for CLE Merchants Plaza 115 W. Washington St. South Tower #1065 Indianapolis, IN 46204-3417 (317) 232-1943 http://www.state.in.us/judiciary/courtrules/admiss.pdf	-Thirty-six hours over a three year period (minimum of six hours per year), of which three hours must be legal ethics over three years. -Reporting date: 31 December.	Minnesota	Director MN State Board of CLE 25 Constitution Ave. Ste. 110 St. Paul, MN 55155 (651) 297-7100 http://www.mbcle.state.mn.us/	-Forty-five hours over a three-year period, three hours must be in ethics, every three years and two hours in elimination of bias. -Reporting date: 30 August.
Iowa	Executive Director Commission on Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 246-8076	-Fifteen hours per year, two hours in legal ethics every two years. -Reporting date: 1 March.	Mississippi**	CLE Administrator MS Commission on CLE P.O. Box 369 Jackson, MS 39205-0369 (601) 354-6056 http://www.msbar.org/meet.html	-Twelve hours per year, one hour must be in legal ethics, professional responsibility, or malpractice prevention. -Military attorneys are exempt. -Reporting date: 31 July.
Kansas	Executive Director CLE Commission 400 S. Kansas Ave. Suite 202 Topeka, KS 66603 (785) 357-6510 http://www.kscle.org	-Twelve hours per year, two hours must be in legal ethics. -Attorneys not practicing in Kansas are exempt. -Reporting date: Thirty days after CLE program, hours must be completed in compliance period 1 July to 30 June.	Missouri	Director of Programs P.O. Box 119 326 Monroe Jefferson City, MO 65102 (573) 635-4128 http://www.mobar.org/mobaracle/index.htm	-Fifteen hours per year, three hours must be in legal ethics every three years. -Attorneys practicing out-of-state are exempt but must claim exemption. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July.
Kentucky	Director for CLE KY Bar Association 514 W. Main St. Frankfort, KY 40601-1883 (502) 564-3795 http://www.kybar.org/clerules.htm	-Twelve and one-half hours per year, two hours must be in legal ethics, mandatory new lawyer skills training to be taken within twelve months of admissions. -Reporting date: June 30.	Montana	MCLE Administrator MT Board of CLE P.O. Box 577 Helena, MT 59624 (406) 442-7660, ext. 5 http://www.montana-bar.org/	-Fifteen hours per year. -Reporting date: 1 March.
Louisiana**	MCLE Administrator LA State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 (504) 619-0140 http://www.lsba.org/html/rule_xxx.html	-Fifteen hours per year, one hour must be in legal ethics and one hour of professionalism every year. -Attorneys who reside out-of-state and do not practice in state are exempt. -Reporting date: 31 January.	Nevada	Executive Director Board of CLE 295 Holcomb Ave. Ste. A Reno, NV 89502 (775) 329-4443 http://www.nvbar.org/	-Twelve hours per year, two hours must be in legal ethics and professional conduct. -Reporting date: 1 March.

New Hampshire**	Asst to NH MCLE Board MCLE Board 112 Pleasant St. Concord, NH 03301 (603) 224-6942, ext. 122 http://www.nhbar.org	-Twelve hours per year, two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client dispute, six hours must come from attendance at live programs out of the office, as a student. -Reporting date: Report period is 1 July - 30 June. Report must be filed by 1 August.	North Dakota	Secretary-Treasurer ND CLE Commission P.O. Box 2136 Bismarck, ND 58502 (701) 255-1404 No web site available	-Forty-five hours over three year period, three hours must be in legal ethics. -Reporting date: Reporting period ends 30 June. Report must be received by 31 July.
New Mexico	Administrator of Court Regulated Programs P.O. Box 87125 Albuquerque, NM 87125 (505) 797-6056 http://www.nmbar.org/mclerules.htm	-Fifteen hours per year, one hour must be in legal ethics. -Reporting period: January 1 - December 31; due April 30.	Ohio*	Secretary of the Supreme Court Commission on CLE 30 E. Broad St. FL 35 Columbus, OH 43266-0419 (614) 644-5470 http://www.sconet.state.oh.us/	-Twenty-four hours every two years, including one hour ethics, one hour professionalism and thirty minutes substance abuse. -Active duty military attorneys are exempt. -Reporting date: every two years by 31 January.
New York*	Counsel The NY State Continuing Legal Education Board 25 Beaver Street, Floor 8 New York, NY 10004 (212) 428-2105 or 1-877-697-4353 http://www.courts.state.ny.us	-Newly admitted: sixteen credits each year over a two-year period following admission to the NY Bar, three credits in Ethics, six credits in Skills, seven credits in Professional Practice/Practice Management each year. -Experienced attorneys: Twelve credits in any category, if registering in 2000, twenty-four credits (four in Ethics) per biennial reporting period, if registering in 2001 and thereafter. -Full-time active members of the U.S. Armed Forces are exempt from compliance. -Reporting date: every two years within thirty days after the attorney's birthday.	Oklahoma**	MCLE Administrator OK Bar Association P.O. Box 53036 Oklahoma City, OK 73152 (405) 416-7009 http://www.okbar.org/mcle/	-Twelve hours per year, one hour must be in ethics. -Active duty military attorneys are exempt. -Reporting date: 15 February.
North Carolina**	Associate Director Board of CLE 208 Fayetteville Street Mall P.O. Box 26148 Raleigh, NC 27611 (919) 733-0123 http://www.ncbar.org/CLE/MCLE.html	-Twelve hours per year including two hours in ethics/or professionalism; three hours block course every three years devoted to ethics/professionalism. -Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption. -Reporting date: 28 February.	Oregon	MCLE Administrator OR State Bar 5200 S.W. Meadows Rd. P.O. Box 1689 Lake Oswego, OR 97035-0889 (503) 620-0222, ext. 359 http://www.osbar.org/	-Forty-five hours over three year period, six hours must be in ethics. -Reporting date: Compliance report filed every three years, except new admittees and reinstated members - an initial one year period.
			Pennsylvania**	Administrator PA CLE Board 5035 Ritter Rd. Ste. 500 P.O. Box 869 Mechanicsburg, PA 17055 (717) 795-2139 (800) 497-2253 http://www.pacle.org/	-Twelve hours per year, including a minimum one hour must be in legal ethics, professionalism, or substance abuse. -Active duty military attorneys outside the state of PA may defer their requirement. -Reporting date: annual deadlines: Group 1-30 Apr Group 2-31 Aug Group 3-31 Dec.
			Rhode Island	Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 222-4942 http://www.courts.state.ri.us/	-Ten hours each year, two hours must be in legal ethics. -Active duty military attorneys are exempt. -Reporting date: 30 June.

South Carolina**	Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578 http://www.commcle.org/	-Fourteen hours per year, at least two hours must be in legal ethics/profession- al responsibility. -Active duty military at- torneys are exempt. -Reporting date: 15 January.	West Virginia	MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311- 2204 (304) 558-7992 http://www.wvbar.org/	-Twenty-four hours over two year period, three hours must be in legal eth- ics, office management, and/or substance abuse. -Active members not prac- ticing in West Virginia are exempt. -Reporting date: Report- ing period ends on 30 June every two years. Report must be filed by 31 July.
Tennessee*	Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096 http://www.cleln.com/	-Fifteen hours per year, three hours must be in le- gal ethics/profession- alism. -Nonresidents, not practic- ing in the state, are ex- empt. -Reporting date: 1 March.	Wisconsin*	Supreme Court of Wisconsin Board of Bar Examiners Tenney Bldg., Suite 715 110 East Main Street Madison, WI 53703-3328 (608) 266-9760 http:// www.courts.state.wi.us/	-Thirty hours over two year period, three hours must be in legal ethics. -Active members not prac- ticing in Wisconsin are ex- empt. -Reporting date: Report- ing period ends 31 Decem- ber every two years. Report must be received by 1 February.
Texas	Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106 http:// www.courts.state.tx.us/	-Fifteen hours per year, three hours must be in le- gal ethics. -Full-time law school fac- ulty are exempt (except ethics requirement). -Reporting date: Last day of birth month each year.	Wyoming	CLE Program Director WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-9061 http://www.wyoming bar.org	-Fifteen hours per year, one hour in ethics. -Reporting date: 30 Janu- ary.
Utah	MCLE Board Administrator UT Law and Justice Center 645 S. 200 East Salt Lake City, UT 84111- 3834 (801) 531-9095 http://www.utahbar.org/	-Twenty-four hours, plus three hours in legal ethics every two years. -Non-residents if not prac- ticing in state. -Reporting date: 31 Janu- ary.			
Vermont	Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281 http://www.state.vt.us/ courts/	-Twenty hours over two year period, two hours in ethics each reporting peri- od. -Reporting date: 2 July.			
Virginia	Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St. Ste. 1500 Richmond, VA 23219-2803 (804) 775-0577 http://www.vsb.org/	-Twelve hours per year, two hours must be in legal ethics. -Reporting date: 31 October.			
Washington	Executive Secretary WA State Board of CLE 2101 Fourth Ave., FL 4 Seattle, WA 98121-2330 (206) 733-5912 http://www.wsba.org/	-Forty-five hours over a three-year period, includ- ing six hours ethics. -Reporting date: 31 January.			

* Military exempt (exemption must be declared with state)

**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available through the Defense Technical Information Center (DTIC)

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The Defense Technical Information Center also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on

establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

- | | |
|------------|--|
| AD A301096 | Government Contract Law Deskbook, vol. 1, JA-501-1-95. |
| AD A301095 | Government Contract Law Deskbook, vol. 2, JA-501-2-95. |
| AD A265777 | Fiscal Law Course Deskbook, JA-506-93. |

Legal Assistance

- | | |
|------------|---|
| AD A384333 | Soldiers' and Sailors' Civil Relief Act Guide, JA-260 (2000). |
| AD A333321 | Real Property Guide—Legal Assistance, JA-261 (1997). |
| AD A326002 | Wills Guide, JA-262 (1997). |
| AD A346757 | Family Law Guide, JA 263 (1998). |
| AD A384376 | Consumer Law Guide, JA 265 (2000). |
| AD A372624 | Uniformed Services Worldwide Legal Assistance Directory, JA-267 (1999). |
| AD A360700 | Tax Information Series, JA 269 (2002). |
| AD A350513 | The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (1998). |

AD A350514 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (1998).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Deployment Guide, JA-272 (1994).

AD A360704 Uniformed Services Former Spouses' Protection Act, JA 274 (2002).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231 (2002).

AD A347157 Environmental Law Deskbook, JA-234 (2002).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1997).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (1998).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (1999).

Legal Research and Communications

AD A332958 Military Citation, Sixth Edition, JAGS-DD (1997).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A303842 Trial Counsel and Defense Counsel Handbook, JA-310 (1995).

AD A302445 Nonjudicial Punishment, JA-330 (1995).

AD A302674 Crimes and Defenses Deskbook, JA-337 (1994).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2003).

Reserve Affairs

AD A345797 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA (1998).

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8.

* Indicates new publication or revised edition.

2. Regulations and Pamphlets

The following provides information on how to obtain *Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars*.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. Consult *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program* (15 July 2002). The U.S. Army Publishing Agency web site provides administrative depart-

mental publications and forms to include Army regulations, circulars, pamphlets, optional forms, standard forms, Department of Defense forms and Department of the Army forms. The web site to access the departmental publications and forms is <http://www.usapa.army.mil>. Consult Table 5-1, AR 25-30, for official departmental publications web sites.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;
- (e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

- (a) Using a Web browser (Internet Explorer 4.0 or higher recommended) go to the following site: <http://jagcnet.army.mil>.
- (b) Follow the link that reads “Enter JAGCNet.”
- (c) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.
- (d) If you have a JAGCNet account, *but do not know*

your user name and/or Internet password, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(e) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(f) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(g) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The following is a current list of TJAGSA publications available in various file formats for downloading from the LAAWS XXI JAGCNet at www.jagcnet.army.mil. These publications are available also on the LAAWS XXI CD-ROM set in PDF, only.

<u>FILE NAME</u>	<u>UPLOADED</u>	<u>DESCRIPTION</u>
JA 200	June 2000	Defensive Federal Litigation, January 2000.
JA 210	October 2000	Law of Federal Employment, September 2000.
JA 211	August 2001	The Law of Federal Labor-Management Relations, August 2001.
JA 215	September 2000	Military Personnel Law, June 1997.
JA 221	June 2000	Law of Military Installations Deskbook, September 1996.
JA 230	June 2000	Morale, Welfare, Recreation Operations, January 1998.
JA 231	November 2002	Reports of Survey and Line of Duty Determinations Guide, September 1992.
JA 234	October 2002	Environmental Law Deskbook, June 2002.

JA 235	May 2000	Government Information Practices, March 2000.	JA 301	May 2000	Unauthorized Absences, August 1995.
JA 241	October 2000	Federal Tort Claims Act, May 2000.	JA 330	May 2000	Nonjudicial Punishment Programmed Text, August 1995.
JA 250	September 2000	Readings in Hospital Law, May 1998.	JA 337	May 2000	Crimes and Defenses Deskbook, July 1994.
JA 260	August 2000	Soldiers' and Sailors' Civil Relief Act Guide, July 2000.	JA 422	October 2002	Operational Law Handbook, June 2002.
JA 261	September 2000	Real Property Guide, December 1997.	JA 501	July 2003	151st Contract Attorneys Course Deskbook, Vols. I & II, August 2003.
JA 263	August 2000	Family Law Guide, May 1998.	JA 506	March 2002	62nd & 63rd Fiscal Law Course Deskbook, March 2002.
JA 265	October 2000	Consumer Law Guides, September 2000.			
JA 267	May 2000	Uniformed Services Worldwide Legal Assistance and Reserve Components Office Directory, November 1999.			
JA 269	February 2003	Tax Information Series, December 2002.			
JA 270	August 2000	The Uniformed Services Employment and Reemployment Rights Act Guide, June 1998.			
JA 271	August 2000	Legal Assistance Office Administration Guide, August 1997.			
JA 272	November 2001	Legal Assistance Deployment Guide, February 1994.			
JA 274	November 2002	Uniformed Services Former Spouses' Protection Act, August 2002.			
JA 275	June 2001	Tax Assistance Program Management Guide, June 2001.			
JA 280	April 2002	Administrative & Civil Law Basic Course Deskbook, (Vols. I & II), March 2002.			
JA 281	June 2000	AR 15-6 Investigations, December 1998.			
JA 320	May 2000	Senior Officer's Legal Orientation Criminal Law Text, November 1995.			

5. Legal Technology Management Office (LTMO)

The Judge Advocate General's School, U.S. Army, continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout TJAGSA.

The Judge Advocate General's School, U.S. Army, faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jag-sch@hqda.army.mil or by calling the LTMO at (434) 971-3314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, <http://ako.us.army.mil>, and then forward your office e-mail to this new account during your stay at TJAGSA. Dial-up internet access is available in TJAGSA billets.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you to the appropriate department or directorate. For additional information, please contact the Legal Technology Management Office at (434) 971-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Dan Lavering, The Judge Advocate General's School & Legal Center, United States Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.Lavering@hqda.army.mil.

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